

BIENNIAL REPORT
of the
ATTORNEY GENERAL
STATE OF FLORIDA

From January 6, 1941, to December 31, 1942

J. TOM WATSON
ATTORNEY GENERAL



Tallahassee, Florida

1942



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LETTER OF TRANSMITTAL

STATE OF FLORIDA

ATTORNEY GENERAL'S OFFICE

Tallahassee, Florida, January 1, 1943.

*To His Excellency, Honorable Spessard L. Holland,
Governor of Florida:*

SIR:

As required by Article IV, Section 27 of the Constitution of Florida to make full report of my official acts, of the receipts and expenditures of my office and of the requirements of said office to the Governor at the beginning of each regular session of the Legislature, I have the honor to submit herewith in compliance with such Constitutional mandate, the Biennial Report of my office covering the two calendar years immediately preceding the 1943 session of the Legislature, being the period from January 6, 1941 to December 31, 1942.

In making report of my official acts, I submit the legal opinions rendered by me in writing during such period, except those that are repetitions or are of such casual character as not to have general interest. The excepted opinions are on file in writing in my office indexed so as to be available to the public upon request.

In making report of the receipts and expenditures in my office for the biennium, I submit an itemized statement of my appropriations and expenditures. There have been no receipts of moneys to the office.

In making report of the requirements of my office, I submit a statement giving the general scope of my duties, along with a listing of the departments, commissions and boards for whom I act as attorney and legal advisor and those whom I construe the law to require the rendition of such service for when called upon.

As a part of this report, I have taken the liberty of listing the personnel of my office, the membership of the Supreme Court of the State, the names and circuits of the Circuit Judges of the State, the names of the Judges of the Court of Record of Escambia County, the Criminal Courts of Record, the Court of Crimes of Dade County, the Civil Courts of Record and of the Juvenile Courts, the names and circuits of the State Attorneys and Assistant State Attorneys of the State and the names and counties of the County Solicitors, Assistant County Solicitors and County Prosecuting Attorneys. I am submitting reports obtained from the Circuit Clerks of the State, the Clerk of the Court of Record of Escambia County and the Clerks of the Civil Courts of Record of the cases handled in their courts and reports obtained from the State Attorneys and County Solicitors of the State showing the cases handled by the Criminal Courts of Record and the Court of Crimes of the State.

My personal report to you required under Section 16.05, Florida Statutes, 1941, is not included herein but is delivered to you under separate cover.

Respectfully submitted,

J. TOM WATSON,
Attorney General.

THE OFFICE OF ATTORNEY GENERAL IN FLORIDA

The Attorney General of Florida derives his office from the people. He is elected by popular choice and acquires his powers and authority and is charged with the duties of his office from three primary sources: first, the common law; second, the Constitution of Florida; third, the statutory law of Florida.

Judicial decision, interpretation and construction enter the picture by way of defining, declaring and designating this authority and these duties within the common law, constitutional and statutory, grant and limitation.

COMMON LAW FIELD

He is as much the representative of the State of Florida in the Supreme Court, as the King's Attorney General is his representative in the Court of King's Bench. It is his sole duty to appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in any wise interested, in the Supreme Court of this state. At common law his office is in many respects judicial in character and he is clothed with a considerable discretion. If the power exists, it is not a question of right in him to institute the necessary proceeding when in his opinion a condition exists which requires the exercise of the power. It is a matter of duty. At common law it is his duty to prosecute all actions necessary to protect state's property and revenue; to represent the state in all criminal cases before the appellate court; to revoke and annul grants made by the state improperly or when forfeited by the grantee; to determine the right of any one who claims or usurps any office; to vacate the charter or annul the existence of a corporation for violations of its charter or for omitting to exercise its corporate powers; to enforce trusts; to prevent public nuisances; and in the absence of express legislative restrictions, to exercise all such power and authority as public interest may require. *State ex rel Landis, Attorney General, et al vs. S. H. Kress & Co.*, 115 Fla. 189, 155 So. 823.

CONSTITUTIONAL FIELD

Article IV, Section 22 of the Constitution of Florida, provides as follows: "The Attorney General shall be the legal advisor of the Governor and of each of the Officers of the Executive Department, and shall perform such other legal duties as may be prescribed by law. He shall be the Reporter for the Supreme Court." The full import of this constitutional field of duty has never been defined by the Supreme Court of Florida. Courts of other states have gone very far in their application of similar provisions in the charge of legal duty, responsibility and field of legal representation held to belong to the office.

STATUTORY FIELD

(From time to time special duties are placed upon the Attorney General by the statutes, such as, the preparation of the 1941 Statutory Revision, but the following constitute his general and regular statutory legal representation duties):

1. Make a written report to the Governor five days before the first day of every session of the legislature of the effect and operation of the acts of the last previous session, and the decisions of the Court thereon.

2. At the convening of every session of the legislature, to recommend a person experienced in indexing to supervise and assist the indexing clerks of each House in making the index for both journals and to prepare the journals in bound form.

3. To prepare marginal abstracts to the several sections of the statutory law and a general alphabetical index to the entire general acts of each session of the legislature.

4. To exercise and perform all powers and duties incident or usual to such office and to make and keep in his office a record of all of his official acts and proceedings containing copies of his opinions.

5. On the written requisition of the Governor, Secretary of State, Treasurer, or Comptroller, give his official opinion and legal advice in writing on any matter touching their official duties.

6. To appear in and attend to such suits or prosecutions in any of the courts of the State or in any courts of any other state or of the United States in behalf of the State of Florida.

7. To exercise general superintendence and direction over the several State Attorneys of the State.

8. To report the decisions of the Supreme Court and have them prepared in printed volumes and keep one copy of each in his office.

9. To prepare and cause to be printed copies of fee bills of the various officers of the several counties of the State and to send copies of same to such county officials.

10. To approve the bond of the Comptroller.

11. To prosecute combinations against Florida meats.

12. To investigate and rectify commercial discriminations.

13. To enjoin violations of the laws regulating commercial food stuffs.

14. Conduct condemnation proceedings on behalf of Board of Commissioners of State Institutions and on behalf of the Adjutant General's office for military purposes.

15. Approve articles of incorporation for co-operative marketing associations.

16. Examine and pass on statements filed by investment companies.

17. Bring proceedings to forfeit charters of corporations which violate the laws or fail to comply with mandatory requirements of same.

18. Enforce the anti-trust laws of the State.

19. Pass upon revocation of licenses of investment companies.

20. Bring proceedings to annul franchise of corporations not for profit under certain conditions.

21. Approve title to real estate in which the State is interested.

22. Pass upon permits of associations doing business under a declaration of trust.

23. Represent the State in disbarment proceedings in the Supreme Court.

24. Pass upon and approve regulations of district drainage boards.

25. Certify Everglades Drainage District bonds.

26. Bring proceedings against fair associations for annulment of their charters when laws relating to same are violated.
27. Participate in hearings on prosecutions instituted against violators of pure food and drug laws.
28. Prepare forms for hunting licenses.
29. Conduct proceedings against insolvent or defaulting insurance companies.
30. Conduct all quo warranto proceedings.
31. Act as attorney for the Railroad Commission (this work is negligible because of the fact that the Railroad Commission has authority to employ its own special counsel).
32. Attend all legal business arising in connection with the laws governing the salt water fishing industry.
33. Prepare bonds of contractors for uniform school books.
34. Pass upon legality of and give approval to all investments of school district sinking funds in purchases of bonds.
35. Devise and furnish a form of seal for all the courts of the State.
36. Bring proceedings for annulment of franchises of social clubs under certain conditions.
37. Give special attention to legal proceedings in connection with the sponge fishing industry.
38. Conduct suits on bonds of State Health Officer.
39. Act as legal advisor and attorney for State Plant Board.
40. Act as legal advisor for State Road Department, which department, however, has a special attorney authorized by statute.
41. Sue to recover fines for doing business without a license.
42. Conduct prosecutions against defaulting and delinquent surety companies.
43. Assist in fixing values of securities deposited with State Treasurer by Trust companies under the Trust Act.
44. Enforce vital statistics law.
45. Act as attorney for the State Racing Commission, which commission, however, has statutory authority to employ its special counsel.
46. Act as attorney for the Parole Commission.
47. Ex-officio member and legal advisor of State Defense Council.
48. Conduct extradition hearings for the Governor.
49. Attorney for, during this biennium, under statutory board, the State Board of Administration.

The Attorney General is a member of the following State Boards:

1. Board of Commissioners of State Institutions
2. State Board of Education
3. Trustees of Internal Improvement Fund

4. State Board of Drainage Commissions
5. State Budget Commission
6. State Board of Conservation
7. State Board of Pardons
8. State Canvassing Board
9. Florida Securities Commission
10. Commission to examine into validity of State warrants
11. State Sinking Fund Commission
12. Railroad, etc., Assessment Board
13. State School Book Commission
14. Board for fixing values of investment securities of Trust Companies
15. Board of Commissioners of Okeechobee Flood Control District
16. Delinquent Tax Adjustment Board of Appeals
17. Special Board of Tax Appeals
18. Board for Supervision and Regulation of forms to be used for assumption of risks by Surety Companies
19. State Housing Board
20. Florida Economic Advancement Council
21. Department of Public Safety Executive Board
22. State Constitution Memorial Commission
23. Board to hold hearings under Food and Drug Act
24. Investment Company Board
25. Board to approve contracts relating to tax collections in certain counties (Chapter 14707, Acts of 1931, Population Act, 8500—9250.
26. Board of Managers of State Bureau of Criminal Identification and Investigation (Chapter 14489, Acts 1929 Ex. Ses. Sec. 1. Not effective because never passed House of Representatives. Is not carried in Statutory Revision, 1941)
27. State Board for Vocational Education
28. Board of Trustees of the Teachers' Retirement System
29. State Text Book Purchasing Board

Respectfully submitted,

J. TOM WATSON,
Attorney General.

COMPILED STATEMENT OF CASES HANDLED IN THE ATTORNEY GENERAL'S OFFICE FROM JANUARY 1, 1941 THROUGH DECEMBER 31, 1942

CIVIL

Number of Cases pending January 1, 1941.....	328
Number of Cases docketed for handling by Attorney General's Office January 1, 1941 through December 31, 1942.....	532
Number of Foreclosure of County and City Tax Certificate Cases docketed wherein the State of Florida was made a party de- fendant and which were referred to County Attorneys for handling	627
Total Cases docketed	1,487
Number of Cases docketed or pending and disposed of during period from January 1, 1941 through December 31, 1942.....	1,162
Number of Cases pending January 1, 1943.....	325

CRIMINAL

Number of Cases pending January 1, 1941.....	50
Number of Cases docketed January 1, 1941 through December 31, 1942	288
Total	338
Number of Cases docketed or pending and disposed of during period from January 1, 1941 through December 31, 1942.....	236
Number of Cases pending January 1, 1943.....	102
TOTAL CIVIL AND CRIMINAL CASES PENDING OR DOCKETED DURING TWO-YEAR PERIOD ENDING DECEMBER 31, 1942	1,825
TOTAL CIVIL AND CRIMINAL CASES CLOSED OR DISPOSED OF DURING TWO-YEAR PERIOD ENDING DECEMBER 31, 1942	1,398
TOTAL CIVIL AND CRIMINAL CASES PENDING JANUARY 1, 1943	427

EXTRADITION STATISTICS

REQUISITIONS

During the years 1941 and 1942 the following States have made requisitions on the State of Florida for fugitives from justice:

Alabama, 20; Arizona, 1; California, 6; Colorado, 1; Connecticut, 1; Georgia, 51; Illinois, 7; Indiana, 3; Iowa, 3; Kentucky, 4; Louisiana, 1; Maryland, 4; Massachusetts, 4; Michigan, 3; Minnesota, 1; Missouri, 3; New Hampshire, 2; New Jersey, 3; North Carolina, 11; North Dakota, 1; New York, 15; Ohio, 6; Oklahoma, 4; Pennsylvania, 2; South Carolina, 5; Tennessee, 2; Texas, 2; Virginia, 4; West Virginia, 1; Wisconsin, 1. TOTAL, 172.

During the years 1941 and 1942 the State of Florida made requisitions on other States and the District of Columbia for fugitives from justice, as follows:

Alabama, 15; Arkansas, 3; Arizona, 1; California, 7; Georgia, 26; Illinois, 4; Indiana, 3; Kansas, 3; Kentucky, 1; Louisiana, 6; Maryland, 2; Michigan, 3; Minnesota, 1; Mississippi, 2; Missouri, 4; North Carolina, 9; New Jersey, 4; New York, 9; Ohio, 3; Pennsylvania, 9; South Carolina, 7; Tennessee, 3; Texas, 3; Virginia, 5; West Virginia, 1; Wisconsin, 3; District of Columbia, 1. TOTAL, 138.

APPROPRIATIONS AND EXPENDITURES ATTORNEY GENERAL

APPROPRIATION

SALARY FUND

Balance January 1, 1941.....	\$ 46,255.14
Appropriation July 1, 1941 to June 30, 1943.....	168,000.00
Total	<u>\$214,255.14</u>

EXPENDITURES

SALARY FUND

January 1, 1941 to June 30, 1941.....	\$ 38,311.54
Amount Reverted July 1, 1941	7,943.60
July 1, 1941 to December 31, 1942.....	119,694.57
Total	<u>\$165,949.71</u>
Balance January 1, 1943	48,305.43

APPROPRIATION NECESSARY AND REGULAR FUND

Balance January 1, 1941	\$ 12,728.03
Appropriation July 1, 1941 to June 30, 1943.....	24,000.00
Total	<u>\$ 36,728.03</u>

EXPENDITURES NECESSARY AND REGULAR FUND

January 1, 1941 to June 30, 1941.....	\$ 12,125.33
Amount Reverted July 1, 1941	602.70
July 1, 1941 to December 31, 1942.....	21,034.36
Total	<u>\$ 33,762.39</u>
Balance January 1, 1943	2,965.64

Statutory Revision Department

APPROPRIATION SALARIES AND NECESSARY AND REGULAR

Balance January 1, 1941	\$ 9,949.97
Appropriation July 1, 1941 to June 30, 1943—Salaries \$44,400.00, necessary and regular \$5,600.00	50,000.00
Total	<u>\$ 59,949.97</u>

EXPENDITURES SALARIES AND NECESSARY AND REGULAR

January 1, 1941 to June 30, 1941.....	\$ 8,912.24
Amount Reverted July 1, 1941	1,037.73
July 1, 1941 to December 31, 1943—Salaries \$30,687.02, necessary and regular \$3,687.97	34,374.99
Total	<u>\$ 44,324.96</u>
Balance, salaries \$13,712.98, necessary and regular \$1,912.03, January 1, 1943	15,625.01

FORMER ATTORNEYS GENERAL OF FLORIDA

1845-1941

JOSEPH BRANCH	1845-1846
AUGUSTUS E. MAXWELL	1848-1848
JAMES T. ARCHER	1848-1848
DAVID P. HOGUE	1848-1853
MARIANO D. PAPY	1853-1860
JOHN B. GALBRAITH	1860-1868
JAMES D. WESTCOTT, JR.	1868-1868
A. R. MEEK	1868-1870
SHERMAN CONANT	1870-1870
J. P. C. DREW	1870-1872
H. BISSBEE, JR.	1872-1872
J. P. C. EMMONS	1872-1873
WILLIAM A. COCKE	1873-1877
GEORGE P. RANEY	1877-1885
C. M. COOPER	1885-1889
WILLIAM B. LAMAR	1889-1903
JAMES B. WHITFIELD	1903-1904
W. H. ELLIS	1904-1909
PARK TRAMMELL	1909-1913
THOMAS F. WEST	1913-1917
VAN C. SWEARINGEN	1917-1921
RIVERS BUFORD	1921-1925
J. B. JOHNSON	1925-1927
FRED H. DAVIS	1927-1931
CARY D. LANDIS	1931-1938
GEORGE COUPER GIBBS	1938-1941

STATE LAW DEPARTMENT

ATTORNEY GENERAL

J. TOM WATSON

ASSISTANT ATTORNEYS GENERAL

D. STUART GILLIS, Chief Assistant.....	January, 1941-
LAWRENCE A. TRUETT	September, 1937-
DONALD K. CARROLL.....	January, 1941-December, 1941
MILLARD B. CONKLIN	January, 1941-
LEWIS W. PETTEWAY	January, 1941-
THOMAS V. KIERNAN*.....	January, 1941-February, 1942
NATHAN COCKRELL	1940-June, 1941
M. C. MCINTOSH	April, 1921-June, 1941
H. E. CARTER.....	January, 1926-March, 1941
ROY CAMPBELL (During 1941 period on sick leave and restricted pay)	1926-April, 1941
E. ALBERT PALLOT.....	January, 1941-July, 1941
JOSEPH E. GILLEN.....	June, 1941-November, 1942
PAUL E. RAYMOND*	August, 1941-August, 1942
SIDNEY SEGALL	September, 1941-December, 1941
J. R. BULLOCK	March, 1942-
JAMES H. MILLICAN, JR.	November, 1942-

SPECIAL ASSISTANT ATTORNEYS GENERAL

JAMES B. TONEY (and Office Manager)	January, 1941-
KENNETH BALLINGER*.....	April, 1941-June, 1942
TIFFANY T. TURNBULL*.....	January, 1941-August, 1942
WOODROW MELVIN (Promoted to Assistant Attorney General, November, 1942)	November, 1940-
H. TOLBERT BLACK	July, 1941-

LIBRARIAN

T. L. KARN	January, 1941-
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* In service with armed forces.

SECRETARIES

HARRIETT C. POMEROY	September, 1941-
HELEN ROUNTREE	April, 1942-
BESSIE MARTIN	September, 1939-
VIRGINIA HAMMOND	March, 1941-
HARRIET E. ROEBUCK	July, 1935-
LUCILLE HAM	January, 1941-
MARTHA BANNERMAN	September, 1941-
MARION DAVIDSON	February, 1942-
HAZEL SANDERSON	August, 1939-
VERA ZIMMERMAN	August, 1941-
ROSA STANALAND	April, 1941-
EVELYN DAVIS	July, 1929-
KATHRON HIGHTOWER	June, 1941-
MARY VALLANCE	November, 1942-
LORRAINE W. EVANS	March, 1931-December, 1941
RUBY SIMMONS	January, 1941-January, 1942
HOPE MCBRYDE	March, 1941-June, 1941
MARIE STEARNS	February, 1941-June, 1941
AILEENA WISDOM	October, 1941-November, 1942
NELLIE CONE OWEN	October, 1937-September, 1941
MARION RUFF	February, 1941-July, 1941
RHEBE PHILLIPS	October, 1941-April, 1942

FILING SECRETARY

MARGARET E. GANNON	April, 1929-
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ASSISTANT FILE CLERK

KAY GILLIS	February, 1942-July, 1942
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RECEPTIONISTS

JIMMIE RUTH PORTER	February, 1941-June, 1942
RUTH PAYNE BOMFORD	June, 1942-

STATUTORY REVISION, RESEARCH AND DRAFTING

J. TOM WATSON, Attorney General

ASSISTANT ATTORNEYS GENERAL

FRED M. BURNS August, 1939-
 JOHN C. WYNN October 1941-
 D. B. WHITAKER January, 1941-
 LEWIS H. TRIBBLE August, 1939-March, 1941

SPECIAL ATTORNEYS

C. H. B. FLOYD November, 1942-

LAW CLERKS

THOMAS V. McCAUL January, 1941-August, 1942
 J. SLATER SMITH, JR.* July, 1941-November, 1941
 FRANK WOTITZKY* July, 1941-December, 1941
 E. W. WELCH* September, 1941-February, 1942
 WILLIAM CRAWFORD July, 1941-September, 1941

INDEXER

LOUIS O. GRAVELY August, 1941-August, 1942

STENOGRAPHERS

ELLA MURPHY November, 1941-August, 1942
 JORI PERRY January, 1941-January, 1942
 SARA GRANT June, 1941-August, 1942
 LEMOYNE HANCOCK February, 1941-September, 1942
 LEONORA O'CONNELL February, 1941-March, 1941
 NADIA GIDDENS April, 1941-November, 1941
 MARGARET HALL August, 1941-
 ADDIS CHASTIAN July, 1941-August, 1941
 JOHN COLLIER HORNE July, 1937-
 GLORIA ARANGO February, 1941-

* In service with armed forces.

JUDICIAL DEPARTMENT OF FLORIDA

Supreme Court Justices

TALLAHASSEE

DECEMBER
1942

Hon. ARMSTEAD BROWN, Chief Justice.

DIVISION A

Hon. JAMES B. WHITFIELD
(Retired January 4, 1943.)

Hon. RIVERS BUFORD.

Hon. ALTO ADAMS.

DIVISION B

Hon. GLENN TERRELL.

Hon. R. H. CHAPMAN.

Hon. ELWYN THOMAS.

Hon. GUYTE P. McCORD, Clerk Supreme Court.

Hon. J. TOM WATSON, Attorney General.

Hon. T. T. TURNBULL, Attorney for State Railroad Commission.

Hon. T. M. SHACKLEFORD, Attorney for State Road Department.

The Supreme Court was reorganized January 12, 1943, as follows:

Hon. RIVERS BUFORD, Chief Justice.

DIVISION A

Hon. GLENN TERRELL.

Hon. R. H. CHAPMAN.

Hon. ALTO ADAMS.

DIVISION B

Hon. ARMSTEAD BROWN.

Hon. ELWYN THOMAS.

Hon. H. L. SEBRING.

JUDGES OF THE CIRCUIT COURT

FIRST CIRCUIT.....	Hon. R. A. McGEACHY. Hon. L. L. FABISINSKI.
SECOND CIRCUIT.....	Hon. E. C. LOVE. Hon. W. MAY WALKER.
THIRD CIRCUIT.....	Hon. R. H. ROWE. Hon. HAL W. ADAMS.
FOURTH CIRCUIT.....	Hon. DEWITT T. GRAY. Hon. BAYARD B. SHIELDS. Hon. A. D. McNEILL.
DUVAL CIRCUIT.....	Hon. MILES W. LEWIS.
FIFTH CIRCUIT.....	Hon. J. C. B. KOONCE. Hon. F. R. HOCKER.
SIXTH CIRCUIT.....	Hon. JOHN U. BIRD. Hon. T. FRANK HOBSON.
SEVENTH CIRCUIT.....	Hon. GEO. WM. JACKSON. Hon. HERBERT B. FREDERICK. ¹
EIGHTH CIRCUIT.....	Hon. H. L. SEBRING. ² Hon. JNO. A. J. MURPHY. ³ Hon. A. Z. ADKINS.
NINTH CIRCUIT.....	Hon. M. B. SMITH. Hon. A. O. KANNER. Hon. FRANK A. SMITH.
TENTH CIRCUIT.....	Hon. H. C. PETTEWAY. Hon. D. O. ROGERS.
ELEVENTH CIRCUIT.....	Hon. W. W. TRAMMELL. Hon. ROSS WILLIAMS. Hon. PAUL D. BARNES. Hon. GEORGE E. HOLT. Hon. ARTHUR GOMEZ. Hon. RICHARD H. HUNT. ⁴
TWELFTH CIRCUIT.....	Hon. GEO. W. WHITEHURST. Hon. W. T. HARRISON.
THIRTEENTH CIRCUIT.....	Hon. L. L. PARKS. Hon. HARRY N. SANDLER.
FOURTEENTH CIRCUIT.....	Hon. IRA A. HUTCHISON. Hon. E. C. WELCH.
FIFTEENTH CIRCUIT.....	Hon. GEO. W. TEDDER. Hon. C. E. CHILLINGWORTH. ⁵

JUDGE OF THE COURT OF RECORD

ESCAMBIA COUNTY.....	Hon. ERNEST E. MASON.
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JUDGES OF THE CRIMINAL COURT OF RECORD

DADE COUNTY.....	Hon. BEN C. WILLARD.
DUVAL COUNTY.....	Hon. BRYAN SIMPSON.
HILLSBOROUGH COUNTY.....	Hon. JOHN R. HIMES.
MONROE COUNTY.....	Hon. WM. V. ALBURY. Hon. THOMAS S. CARO. ⁶
ORANGE COUNTY.....	Hon. W. M. MURPHY.
PALM BEACH COUNTY.....	Hon. JOHN L. MOORE.
POLK COUTNY.....	Hon. ROBERT T. DEWELL. Hon. ROY H. AMIDON. ⁷

JUDGE OF THE COURT OF CRIMES

DADE COUNTY.....	Hon. N. VERNON HAWTHORNE (Acting) Hon. WAYNE ALLEN. ⁸
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¹ In the armed services.² Elected Supreme Court Justice.³ Appointed January 5, 1943.⁴ In the armed services.⁵ In the armed services.⁶ Elected November, 1942; takes office in 1943.⁷ Elected November, 1942; takes office in 1943.⁸ In the armed services.

JUDGES OF THE CIVIL COURT OF RECORD

DADE COUNTY.....	Hon. DAVID J. HEFFERMAN.
	Hon. NORMAN HENDRY.
DUVAL COUTNY.....	Hon. BURTON BARRS.

JUVENILE COURT JUDGES

BREVARD COUNTY.....	Hon. ALBERT M. BOLAND.
DADE COUNTY.....	Hon. WALTER H. BECKHAM.
DUVAL COUNTY.....	Hon. W. S. CRISWELL.
HILLSBOROUGH COUNTY.....	Hon. PAUL R. KICKLITER.
MONROE COUNTY.....	Hon. JULIETTE RUSSELL.
ORANGE COUNTY.....	Hon. MATTIE H. FARMER (Acting).
	Hon. JAMES E. DIEFFENWORTH. ⁹
PINELLAS COUNTY.....	Hon. C. E. WARE.

STATE ATTORNEYS

FIRST CIRCUIT.....	Hon. J. EDWIN HOLSBERRY, Pensacola.
SECOND CIRCUIT.....	Hon. ORION C. PARKER, Tallahassee.
THIRD CIRCUIT.....	Hon. KEITH BLACK, Lake City. ¹⁰
	Hon. ALFRED T. AIRTH, Live Oak.
FOURTH CIRCUIT.....	Hon. INMAN P. CRUTCHFIELD, Jacksonville.
	Hon. WILLIAM HALLOWES, III. ¹¹
FIFTH CIRCUIT.....	Hon. J. W. HUNTER, Tavares.
SIXTH CIRCUIT.....	Hon. CHESTER B. McMULLEN, Clearwater.
SEVENTH CIRCUIT.....	Hon. MURRAY SAMS, DeLand.
EIGHTH CIRCUIT.....	Hon. T. E. DUNCAN, Gainesville.
NINTH CIRCUIT.....	Hon. MURRAY W. OVERSTREET, Kissimmee.
TENTH CIRCUIT.....	Hon. L. GRADY BURTON, Wauchula.
ELEVENTH CIRCUIT.....	Hon. G. A. WORLEY, Miami.
	Hon. STANLEY MILLEDGE, Miami. ¹²
TWELFTH CIRCUIT.....	Hon. CLYDE H. WILSON, Sarasota.
THIRTEENTH CIRCUIT.....	Hon. J. REX FARRIOR, Tampa.
FOURTEENTH CIRCUIT.....	Hon. L. D. McRAE, Chipley.
FIFTEENTH CIRCUIT.....	Hon. JOSEPH S. WHITE, West Palm Beach.
	Hon. PHIL O'CONNELL. ¹³

ASSISTANT STATE ATTORNEYS

SECOND CIRCUIT.....	Hon. O. O. EDWARDS, Cross City.
FIFTH CIRCUIT.....	Hon. C. A. SAVAGE, Ocala.
SIXTH CIRCUIT.....	Hon. ARTHUR L. AUVEL, Dade City.
SEVENTH CIRCUIT.....	Hon. JULIAN C. CALHOUN, Palatka.
EIGHTH CIRCUIT.....	Hon. JOE HILL WILLIAMS, Lake Butler.
NINTH CIRCUIT.....	Hon. ANGUS SUMNER, Fort Pierce.
	Hon. LLOYD F. BOYLE, Sanford.
TENTH CIRCUIT.....	Hon. WALTER W. WOOLFOLK, Lake Wales.
ELEVENTH CIRCUIT.....	Hon. J. LANCELOT LESTER, Key West.
TWELFTH CIRCUIT.....	Hon. W. M. SMILEY, Bradenton.
	Hon. SUMTER LEITNER, Arcadia.
FOURTEENTH CIRCUIT.....	Hon. H. V. McCLELLAN, Blountstown.
FIFTEENTH CIRCUIT.....	Hon. LOUIS F. MAIRE, Fort Lauderdale.

COUNTY SOLICITORS

DADE COUNTY.....	Hon. ROBERT R. TAYLOR, Miami.
DUVAL COUNTY.....	Hon. HARRY H. MARTIN, Jacksonville.
	Hon. WAYNE RIPLEY, Jacksonville. ¹⁴
ESCAMBIA COUNTY.....	Hon. FORSYTH CARO, Pensacola.
HILLSBOROUGH COUNTY.....	Hon. JOSEPH E. WILLIAMS, Tampa.

⁹ In the armed services.¹⁰ In the armed services.¹¹ In the armed services.¹² Elected in 1942; takes office in 1943.¹³ In the armed services.¹⁴ In the armed services.

MONROE COUNTY.....	Hon. ALLAN B. CLEARE, JR., Key West.
ORANGE COUNTY.....	Hon. O. RAYMOND ELLARS, Orlando.
PALM BEACH COUNTY.....	Hon. W. E. ROEBUCK, West Palm Beach.
POLK COUNTY.....	Hon. GUNTER STEPHENSON, Winter Haven.

ASSISTANT COUNTY SOLICITORS

DADE COUNTY.....	Hon. GLENN C. MINCER, Miami.
	Hon. ALBERT D. HUBBARD, Miami.
	Hon. LOUIS J. HAMEL, Miami.
	Hon. ANDREW T. HEALY, Miami.
DUVAL COUNTY.....	Hon. LLOYD LAYTON, Jacksonville.
ESCAMBIA COUNTY.....	None.
HILLSBOROUGH COUNTY.....	Hon. B. A. GREGORY, Tampa.
	Hon. J. G. SPICOLA, Tampa.
	Hon. HARRY G. McDONALD, Tampa.
MONROE COUNTY.....	None.
ORANGE COUNTY.....	None.
PALM BEACH COUNTY.....	None.
POLK COUNTY.....	Hon. G. B. LANGSTON, Bartow.

COUNTY PROSECUTING ATTORNEYS

BROWARD COUNTY.....	Hon. W. GERRY MILLER, Fort Lauderdale.
DESOTO COUNTY.....	Hon. M. A. ROSIN, Arcadia.
GADSDEN COUNTY.....	Hon. WILLIAM D. DOSS, Quincy.
INDIAN RIVER COUNTY.....	Hon. SHERMAN N. SMITH, JR., Vero Beach.
JEFFERSON COUNTY.....	Hon. B. J. HAMRICK, Monticello.
LEE COUNTY.....	Hon. JOHN K. WOOLSLAIR, Fort Myers.
MANATEE COUNTY.....	Hon. GEORGE R. HITCHCOLK, Bradenton.
MARTIN COUNTY.....	Hon. T. T. OUGHTERSON, Stuart.
OKEECHOBEE COUNTY.....	Hon. PAUL WONGREY, Okeechobee.
OSCEOLA COUNTY.....	Hon. O. PRESTON JOHNSON, Kissimmee.
PASCO COUNTY.....	Hon. J. DON GEIGER, Dade City.
PINELLAS COUNTY.....	Hon. HENRY S. BAYNARD, Clearwater.
ST. LUCIE COUNTY.....	Hon. A. C. SIMMONS, Fort Pierce.
SARASOTA COUNTY.....	Hon. LAMAR B. DOZIER, Sarasota.
SEMINOLE COUNTY.....	Hon. GEORGE A. SPEER, JR., Sanford.
SUMTER COUNTY.....	Hon. JAMES W. WEST, Bushnell.

REPORTS OF STATE ATTORNEYS FOR YEARS 1941-1942, INCLUSIVE, UNDER SECTION 16.09, FLORIDA STATUTES, 1941.

FIRST JUDICIAL CIRCUIT

Escambia County
Okaloosa County

Santa Rosa County
Walton County

ESCAMBIA:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	6	2
Rape	4	1
Assaults	1	—
Perjury	1	—
Adultery, Fornication, etc.	1	—
Election Law Violations	6	—
Gambling Violations	3	—
Doing Business Without a License	3	—

OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	17	—
Habeas Corpus Hearings Attended	3	—

Respectfully submitted,

J. EDWIN HOLSBERRY,
State Attorney.

OKALOOSA:

	Information and Indictments	Verdicts of Not Guilty Returned
Robbery:		
Armed	1	—
Unarmed	2	—
Assaults:		
With intent to Commit Felony	6	2
Other Assaults	15	2
Arson and Kindred Offenses	3	—
Burglary and Kindred Offenses	4	1
Larceny:		
Of Automobiles	3	—
Of Cattle	1	1
Kindred Offenses	6	1
Forgery, Counterfeiting and Kindred Offenses	1	—
Resisting Arrest, etc.	1	—
Adultery, Fornication, etc.	12	—
Incest	1	—
Bigamy	1	—
Desertion and Withholding Support from Wife and Children	3	—
Liquor Violations	11	2
Unlawful Practice of Medicine	3	—
Violator, Railroad Commission	2	—
Other Miscellaneous	1	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings.....	4	1 completed, 3 dismissed
Bond Estreature Proceedings	4	2 completed, 2 pending
Criminal Hearings Attended	6	
Habeas Corpus Hearings Attended....	1	Bond set
Other Cases Not Enumerated		
Handled by State Attorney	23	No informations, returned County Judge, etc.

Respectfully submitted,

J. EDWIN HOLSBERRY,
State Attorney.

SANTA ROSA:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
Manslaughter	1	—
Robbery:		
Armed	1	—
Assaults:		
With intent to Commit Felony	15	6
Other Assaults	15	—
Arson and Kindred Offenses	2	2
Burglary and Kindred Offenses	19	—
Larceny:		
Of Automobiles	2	—
Of Cattle	2	—
Kindred Offenses	22	4
False Pretenses and Kindred Offenses	2	—
Forgery, Counterfeiting and Kindred Offenses....	4	—
Trespasses, Injuring Building, etc.	14	2
Perjury	1	—
Adultery, Fornication, etc.	6	2
Bigamy	1	—
Crime Against Nature	2	1
Desertion and Withholding Support from Wife and Children	8	—
Selling Mortgaged Property	2	—
Causing Improper Issuance Marriage License....	1	—
Aiding Escape	1	—
Unlawful Practice of Medicine	1	—
Untaxed Liquor Possession	3	—
Burning Woods	4	3
Malicious Injury to Animal	2	2
Leaving Scene of Accident	1	—

OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	8	—
Habeas Corpus Hearings Attended	1	Bond set

Respectfully submitted,

J. EDWIN HOLSBERRY,
State Attorney.

WALTON:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
Second Degree	1	1
Assaults:		
With intent to Commit Felony	1	—
Other Assaults	1	1
Larceny:		
Kindred Offenses	1	—
Various Offenses, Miscellaneous	111	12

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court	3	3 reversed
Bond Validation Proceedings	1	Completed
Bond Estreature Proceedings	6	6 cash bonds collected
Criminal Hearings Attended	7	7 completed
Other Cases Not Enumerated		
Handled by State Attorney	34	No informations Re- turned County Judge, etc.

Respectfully submitted,

J. EDWIN HOLSBERRY,
State Attorney.

SECOND JUDICIAL CIRCUIT

Franklin County
Gadsden County
Jefferson County

Leon County
Liberty County
Wakulla County

FRANKLIN:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	8	—
Manslaughter	2	1
Rape	2	—
Assaults:		
With intent to Commit Felony	18	1
Other Assaults	5	—
Burglary and Kindred Offenses	44	3
Larceny:		
Of Automobiles	3	1
Of Cattle	2	—
Kindred Offenses	5	—
Forgery, Counterfeiting and Kindred Offenses	4	—
Resisting Arrest, etc.	3	—
Desertion and Withholding Support from Wife and Children	11	2
Malicious Injury to Property	2	—
Worthless Checks Over \$50	2	—
Living in Open State of Adultery	1	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	2	—
Bond Validation Proceedings	2	—
Criminal Hearings Attended	15	—

Respectfully Submitted,

O. C. PARKER, JR.,
State Attorney.

GADSDEN:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	5	—
Second Degree	1	—
Manslaughter	3	—
Robbery:		
Armed	3	—
Assaults:		
With intent to Commit Felony	7	1
Libel and Defamation	3	—
Arson and Kindred Offenses	3	—
Burglary and Kindred Offenses	38	2
Larceny:		
Of Automobiles	5	—
Of Cattle	5	—
Kindred Offenses	8	3
Embezzlement	3	—
Forgery, Counterfeiting and Kindred Offenses....	4	1
Perjury	1	—
Resisting Arrest, etc.	2	—
Crime Against Nature	2	—
Desertion and Withholding Support from Wife and Children	16	2
Shooting Into Dwelling	4	1
Living in Open State of Adultery	3	—
Bad Checks Over \$50	2	—
Receiving Stolen Property	2	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	3	—
Criminal Hearings Attended	10	—

Respectfully Submitted,

O. C. PARKER, JR.,
State Attorney.

JEFFERSON:

Homicide:		
Second Degree	1	—
Manslaughter	1	—
Assaults:		
With intent to Commit Felony	7	2
Other Assaults	2	2
Burglary and Kindred Offenses	4	—

Larceny:		
Of Automobiles	1	—
Of Cattle	1	—
Kindred Offenses	5	2
Offenses Against Public Revenue	1	—
Perjury	1	—
Desertion and Withholding Support from Wife and Children	1	1
Receiving Stolen Property	14	—

Respectfully Submitted,

O. C. PARKER, JR.,
State Attorney.

LEON:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	4	—
Second Degree	5	—
Manslaughter	4	—
Robbery:		
Armed	5	—
Unarmed	6	—
Assaults:		
With intent to Commit Felony	42	1
Other Assaults	9	—
Arson and Kindred Offenses	2	—
Burglary and Kindred Offenses	56	2
Larceny:		
Of Automobiles	11	—
Of Cattle	7	—
Kindred Offenses	4	—
Embezzlement:		
Public Officers	1	—
Other Kinds	3	—
Forgery, Counterfeiting and Kindred Offenses....	22	1
Incest	4	—
Crime Against Nature	3	—
Desertion and Withholding Support from Wife and Children	14	1
Permitting Minors to Loiter in Pool Room.....	2	—
Concealing Stolen Property	7	—
Living in Open Adultery	4	—
Hit and Run Driving	2	—
Operating Car For Hire Without Permit of R. R. Commission	5	—
Lascivious Cohabitation	1	—
Operating Gambling Room	1	—
Moving Car Subject to Lien	3	—
Possession of Mullet Out of Season.....	1	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	2	—
Bond Estreasure Proceedings	9	—
Criminal Hearings Attended	69	—

Respectfully Submitted,

O. C. PARKER, JR.,
State Attorney.

LIBERTY:

	Information and Indictments	Verdicts of Not Guilty Returned
Burglary and Kindred Offenses	2	—
Larceny:		
Of Automobiles	2	—
Kindred Offenses	7	2

OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	5	—

Respectfully Submitted,

O. C. PARKER, JR.,
State Attorney.

WAKULLA:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	3	—
Rape	5	—
Robbery:		
Armed	2	—
Assaults:		
With intent to Commit Felony	7	3
Other Assaults	6	—
Arson and Kindred Offenses	1	—
Burglary and Kindred Offenses	6	1
Larceny:		
Kindred Offenses	11	1
False Pretenses and Kindred Offenses	1	—
Trespass	1	—
Violating Sanitary Code	1	—
Desertion and Withholding Support from Wife and Children	20	1
Operating Gambling House	1	—
Malicious Injury to Public Building	1	—
Possession of Liquor Without Stamps	1	—
Practicing Medicine Without License	2	—
Stop-netting	1	—
Shooting Into Dwelling	1	—

OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	16	—

Respectfully Submitted,

O. C. PARKER, JR.,
State Attorney.

THIRD JUDICIAL CIRCUIT

Columbia County
Dixie County
Hamilton County
Lafayette County

Madison County
Suwanee County
Taylor County

COLUMBIA:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	5	1
Mayhem	1	—
Rape	1	—
Robbery:		
Unarmed	1	—
Assaults:		
With intent to Commit Felony	8	2
Burglary and Kindred Offenses	14	—
Larceny:		
Of Cattle	3	—
Kindred Offenses	14	2
Embezzlement:		
Public Officers	1	—
Other Kinds	4	2
Forgery, Counterfeiting and Kindred Offenses....	13	—
Trespasses, Injuring Buildings, etc.	1	—
Resisting Arrest, etc.	1	—
Adultery, Fornication, etc.	1	—
Bigamy	1	—
Crime Against Nature	1	—
Desertion and Withholding Support from Wife and Children	18	—
Hit and Run Driver	1	—
Unlawfully Killing an Animal of Another.....	3	1
Unlawfully Operating Motor Vehicle on High- way Without Proper Certificate	2	—
Unlawfully Imputing a Want of Chastity to a Female Person	1	—
Keeping a Gambling House	4	—

OTHER CASES HANDLED

	Number	Disposition
Bond Estreature Proceedings	2	Judgment entered
Criminal Hearings Attended	16	—
Habeas Corpus Hearings Attended	2	Defendant released

Respectfully submitted,

A. K. BLACK and ALFRED T. AIRTH,
State Attorneys.

O. O. EDWARDS,
Assistant State Attorney.

DIXIE:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	9	3
Robbery:		
Unarmed	1	1
Assaults:		
With intent to Commit Felony	8	4
Burglary and Kindred Offenses	9	2
Larceny:		
Of Automobiles	3	1
Kindred Offenses	3	—

False Pretenses and Kindred Offenses	3	—
Forgery, Counterfeiting and Kindred Offenses....	5	—
Desertion and Withholding Support from Wife and Children	10	1
Maintaining a Nuisance	2	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	1	Reversed
Bond Validation Proceedings	1	Bonds Validated
Bond Estreature Proceedings	2	Judgments entered
Criminal Hearings Attended	30	—
Habeas Corpus Hearings Attended	20	—

Respectfully submitted,

A. K. BLACK and ALFRED T. AIRTH,
State Attorneys.O. O. EDWARDS,
Assistant State Attorney.

HAMILTON:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	5	2
Rape	1	1
Robbery:		
Armed	1	—
Assaults:		
With intent to Commit Felony	9	1
Other Assaults	2	1
Burglary and Kindred Offenses	5	—
Larceny:		
Of Automobiles	2	—
Of Cattle	1	—
Kindred Offenses	5	—
False Pretenses and Kindred Offenses	1	—
Forgery, Counterfeiting and Kindred Offenses....	1	—
Trespasses, Injuring Buildings, etc.	1	—
Desertion and Withholding Support from Wife and Children	7	—
Unlawful Imprisonment of Another.....	1	—
Inhuman and Oppressive Treatment of a Per- son in Custody	1	—
Unlawfully Refusing Treatment for Venereal Disease	11	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	1	Validation of Bonds refused by Court
Criminal Hearings Attended	13	—
Habeas Corpus Hearings Attended	2	Defendants held

Respectfully submitted,

A. K. BLACK and ALFRED T. AIRTH,
State Attorneys.O. O. EDWARDS,
Assistant State Attorney.

LAFAYETTE:

	Information and Indictments	Verdicts of Not Guilty Returned
Assaults:		
With intent to Commit Felony	1	—
Larceny:		
Of Cattle	4	1
Kindred Offenses	4	—
False Pretenses and Kindred Offenses	2	—
Resisting Arrest, etc.	1	—
Desertion and Withholding Support from Wife and Children	5	—
Falsely Impersonating an Officer	3	—

OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	8	—
Other Cases Not Enumerated Handled by State Attorney	1	Defendant held for contempt of court

Respectfully submitted,

A. K. BLACK and ALFRED T. AIRTH,
State Attorneys.O. O. EDWARDS,
Assistant State Attorney.

MADISON:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	4	—
Manslaughter	1	—
Mayhem	1	—
Rape	1	1
Assaults:		
With intent to Commit Felony	5	1
Arson and Kindred Offenses	1	—
Burglary and Kindred Offenses	8	—
Larceny:		
Of Cattle	5	—
Kindred Offenses	11	2
Embezzlement:		
Public Officers	1	—
Other Kinds	1	—
False Pretenses and Kindred Offenses	3	—
Forgery, Counterfeiting and Kindred Offenses	3	—
Incest	3	1
Desertion and Withholding Support from Wife and Children	13	—
Operating a House of Ill Fame	1	—
Unlawfully Killing an Animal of Another	1	—

OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	10	—

Respectfully submitted,

A. K. BLACK and ALFRED T. AIRTH,
State Attorneys.O. O. EDWARDS,
Assistant State Attorney.

SUWANNEE:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	10	1
Robbery:		
Armed	1	—
Assaults:		
With intent to Commit Felony	16	2
Other Assaults	1	—
Burglary and Kindred Offenses	18	1
Larceny:		
Of Automobiles	5	—
Of Cattle	3	1
Kindred Offenses	14	1
Embezzlement	8	—
False Pretenses and Kindred Offenses	1	—
Forgery, Counterfeiting and Kindred Offenses...	4	—
Trespasses, Injuring Buildings, etc.	2	—
Resisting Arrest, etc.	2	—
Conspiracy	2	—
Bigamy	1	—
Desertion and Withholding Support from Wife and Children	7	—
Hit and Run Driver	1	—
Unlawfully Killing an Animal of Another.....	2	—
Unlawful Possession of Counterfeit Coins.....	1	—
Violation of Primary Election Laws	4	—
Unlawfully Aiding a Prisoner to Escape.....	1	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	2	Pending
Bond Estreature Proceedings	1	Judgment for Defendant
Criminal Hearings Attended	19	
Habeas Corpus Hearings Attended.....	4	Defendants held

Respectfully submitted,

A. K. BLACK and ALFRED T. AIRTH,
State Attorneys.O. O. EDWARDS,
Assistant State Attorney.

TAYLOR:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	3	1
Manslaughter	2	1
Rape	1	—
Assaults:		
With intent to Commit Felony	2	—
Arson and Kindred Offenses	1	—
Burglary and Kindred Offenses	2	—
Larceny:		
Of Automobiles	3	—
Of Cattle	7	2
Kindred Offenses	6	—

Forgery, Counterfeiting and Kindred Offenses.....	2	—
Trespasses, Injuring Buildings, etc.	3	—
Crime Against Nature	2	—
Desertion and Withholding Support from Wife and Children	17	—
Miscellaneous	1	—

OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	16	—
Habeas Corpus Hearings Attended	5	—

Respectfully submitted,

A. K. BLACK and ALFRED T. AIRTH,
State Attorneys.O. O. EDWARDS,
Assistant State Attorney.

FOURTH JUDICIAL CIRCUIT

Clay County

Nassau County

Duval County

CLAY:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	1	—
Manslaughter	3	—
Robbery:		
Unarmed	2	—
Assaults	4	—
Burglary and Kindred Offenses	7	—
Larceny:		
Of Automobiles	4	—
Of Cattle	6	—
Kindred Offenses	2	—
Embezzlement	1	—
Forgery, Counterfeiting and Kindred Offenses...	1	—
Trespasses, Injuring Buildings, etc.	1	—
Adultery, Fornication, etc.	2	—
Bigamy	1	—
Shooting Cow	1	—
Practicing Medicine Without License	2	—
Receiving Stolen Property	1	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	1	—
Bond Estreature Proceedings	2	—
Criminal Hearings Attended	12	—
Habeas Corpus Hearings Attended	3	—
Other Cases Not Enumerated Handled by State Attorney	7	—

Respectfully submitted,

INMAN P. CRUTCHFIELD,
State Attorney.

DUVAL:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	39	6
Second Degree	29	—
Manslaughter	7	—
Rape	5	3
Perjury	1	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	2	—
Bond Validation Proceedings	3	—
Bond Estreature Proceedings	17	—
Criminal Hearings Attended	166	—
Habeas Corpus Hearings Attended	27	—
Other Cases Not Enumerated Handled by State Attorney	67	—

Respectfully submitted,

INMAN P. CRUTCHFIELD,
State Attorney.

NASSAU:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	6	2
Second Degree	1	—
Manslaughter	2	1
Mayhem	1	1
Rape	2	1
Robbery:		
Armed	2	—
Assaults	4	—
Burglary and Kindred Offenses	11	—
Larceny:		
Of Automobiles	8	—
Of Cattle	4	1
Kindred Offenses	2	—
Embezzlement	2	—
Forgery, Counterfeiting and Kindred Offenses..	3	—
Violation Liquor Law, Second Offense.....	1	—
Hit and Run	3	1
Aggravated Assault	2	—
Shooting Into Dwelling	1	—
Intercourse With Unmarried Female	1	1
Conveying Weapon Into Jail	1	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	2	—
Bond Estreature Proceedings	1	—
Criminal Hearings Attended	25	—
Habeas Corpus Hearings Attended	7	—
Other Cases Not Enumerated Handled by State Attorney	10	—

Respectfully submitted,

INMAN P. CRUTCHFIELD,
State Attorney.

FIFTH JUDICIAL CIRCUIT

Citrus County
Hernando County

Sumter County

Lake County
Marion County

CITRUS:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	3	1
Manslaughter	1	—
Mayhem	2	—
Robbery:		
Armed	1	—
Assaults:		
With intent to Commit Felony	5	—
Burglary and Kindred Offenses	11	—
Larceny:		
Of Cattle or Hogs	5	—
Kindred Offenses	3	—
Embezzlement	3	—
Forgery, Counterfeiting and Kindred Offenses....	1	—
Resisting Arrest, etc.	1	—
Adultery, Fornication, etc.	1	—
Bigamy	1	—
Crime Against Nature	1	—
Desertion and Withholding Support from Wife and Children	7	—
Hit and Run Driver	1	—
Receiving Stolen Goods	2	—
Injury to Public Buildings.....	1	—
Lewd and Lascivious Cohabitation	1	—
Larceny of Timber	2	1
Information Unlawful Escape	2	—

OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	1	—

Respectfully submitted,

J. W. HUNTER,
State Attorney.

HERNANDO:

	Information and Indictments	Verdicts of Not Guilty Returned
Larceny:		
Of Automobiles	1	—
Kindred Offenses	5	—
Violation Liquor Law, Second Offense.....	4	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	2	—

Respectfully submitted,

J. W. HUNTER,
State Attorney.

LAKE:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	5	—
Second Degree	1	—
Manslaughter	1	—
Robbery:		
Armed	1	—
Assaults:		
With intent to Commit Felony	10	—
Other Assaults	1	—
Burglary and Kindred Offenses	14	—
Larceny:		
Of Automobiles	10	—
Kindred Offenses	2	—
Embezzlement	1	—
False Pretenses and Kindred Offenses	2	—
Forgery, Counterfeiting and Kindred Offenses	7	—
Adultery, Fornication, etc.	1	—
Incest	1	—
Violation Liquor Law, Second Offense	1	—
Desertion and Withholding Support from Wife and Children	4	—
Unlawfully Operating Automobile	1	—
Possession of Burglar Tools	1	—
Receiver of Stolen Goods	2	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	2	—
Criminal Hearings Attended	12	—
Habeas Corpus Hearings Attended	2	—

Respectfully submitted,

J. W. HUNTER,
State Attorney.

MARION:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	9	—
Robbery:		
Armed	1	1
Assaults:		
With intent to Commit Felony	20	—
Other Assaults	1	—
Arson and Kindred Offenses	1	—
Burglary and Kindred Offenses	90	—
Larceny:		
Of Automobiles	2	—
Of Cattle	10	2
Kindred Offenses	22	5
Embezzlement	5	—
False Pretenses and Kindred Offenses	10	—
Forgery, Counterfeiting and Kindred Offenses	20	—
Trespasses, Injuring Building, etc.	3	—
Offenses Against Public Revenue	1	1

Incest	1	1
Desertion and Withholding Support from Wife and Children	20	—
Removing Property Under Lien	1	—
Hit and Run Driver, etc.	5	—
Crime of Escape from Officer	20	—
Aiding Convict to Escape	2	—
Enticing Away for Purpose of Prostitution.....	1	—
Driving While Intoxicated, etc.	1	—
Attempting to Defraud, etc.	1	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court	2	Affirmed
Bond Validation Proceedings	1	
Bond Estreuture Proceedings	1	Estreated
Criminal Hearings	20	(Preliminary hearings)
Habeas Corpus Hearings Attended	5	
Other Cases Not Enumerated Handled by State Attorney		One Appeal Supreme Court

Respectfully submitted,

J. W. HUNTER,
State Attorney.By C. A. SAVAGE,
Asst. State Attorney.

SUMTER:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	1	1
Robbery:		
Unarmed	1	—
Assaults:		
With intent to Commit Felony	9	—
Arson and Kindred Offenses	1	—
Larceny:		
Of Automobiles	2	—
Of Cattle	3	—
Kindred Offenses	4	—
Embezzlement	2	—
Forgery, Counterfeiting and Kindred Offenses....	1	—
Trespasses, Injuring Buildings, etc.	2	—
Adultery, Fornication, etc.	1	—
Incest	1	—
Desertion and Withholding Support from Wife and Children	2	—
Breaking and Entering Charges	14	—

Respectfully submitted,

J. W. HUNTER,
State Attorney.

SIXTH JUDICIAL CIRCUIT

Pasco County

Pinellas County

PASCO:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	2	2
Robbery:		
Unarmed	1	1
False Imprisonment and Kidnapping	2	—
Assaults:		
With intent to Commit Felony	2	—
Burglary and Kindred Offenses	4	—
Larceny:		
Of Automobiles	2	1
Kindred Offenses	11	3
Forgery, Counterfeiting and Kindred Offenses....	2	—
Adultery, Fornication, etc.	2	2
Bigamy	2	—
Desertion and Withholding Support from Wife and Children	6	—

OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	9	—
Habeas Corpus Hearings Attended	1	Deft. remanded
Other Cases Not Enumerated Handled by State Attorney	10	Dismissed

Respectfully submitted,

CHESTER B. McMULLEN.

State Attorney.

PINELLAS:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	8	—
Second Degree	6	—
Manslaughter	4	2
Rape	2	1
Robbery:		
Armed	1	—
Unarmed	5	1
False Imprisonment and Kidnapping	1	—
Assaults:		
With intent to Commit Felony	10	—
Arson and Kindred Offenses	2	1
Burglary and Kindred Offenses	73	2
Larceny:		
Of Automobiles	4	—
Kindred Offenses	24	3
Embezzlement	8	—
False Pretenses and Kindred Offenses	1	—
Forgery, Counterfeiting and Kindred Offenses....	22	—
Resisting Arrest, etc.	2	—
Adultery, Fornication, etc.	8	—
Desertion and Withholding Support from Wife and Children	14	1

Violation of Uniform Sale of Securities.....	3	—
Disbarment	1	—
Accessory After the Fact	1	—
Receiving Stolen Property	4	—
Passing Worthless Checks	6	—
Habitual Criminal	2	—
Conducting a Lottery	2	—
Obtaining Narcotics by Misrepresentation.....	3	—
Concealing Death of Bastard Child	1	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	10	—
Bond Validation Proceedings	4	—
Bond Estreature Proceedings	3	—
Criminal Hearings Attended	63	—
Habeas Corpus Hearings Attended	8	—
Other Cases Not Enumerated Handled by State Attorney	24	—

Respectfully submitted,

CHESTER B. McMULLEN,
State Attorney.

SEVENTH JUDICIAL CIRCUIT

Flagler County
Putnam County

St. Johns County
Volusia County

FLAGLER:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
Second Degree	2	—
Rape (Intent)	2	—
Assaults	4	—
Larceny:		
Of Hogs	2	—
Kindred Offenses	1	—
Resisting Arrest, etc.	1	—
Issuing Worthless Check	1	—

Respectfully Submitted,

MURRAY SAMS,
State Attorney.

PUTNAM:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	4	—
Rape	1	1
Assaults	2	—
Arson and Kindred Offenses	1	—
Larceny:		
Of Automobiles	1	—
Kindred Offenses	7	—
Embezzlement	2	—

Forgery, Counterfeiting and Kindred Offenses....	1	—
Perjury	1	—
Desertion and Withholding Support from Wife and Children	1	—
Lottery	5	—
Breaking and Entering	8	—
Concealing Personal Property	7	—
Removing Personal Property Under Lien.....	1	—
Violation of State Narcotic Law	1	—
Aiding Escape	1	—
Injury in Operating Automobile Through Cul- pable Negligence and While Intoxicated.....	1	—
Buying and Receiving Stolen Property.....	1	—
Accessory After the Fact	1	—
Severing Timber from Lands of Another.....	1	1

OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	24	—
Habeas Corpus Hearings Attended	7	—

Respectfully submitted,

MURRAY SAMS,
State Attorney.

ST. JOHNS:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
Second Degree	1	1
Manslaughter	2	1
Mayhem	1	—
Rape	1	1
Assaults:		
Assault and Battery	6	Cert. to Co. J.
Other Assaults	6	—
Breaking and Entering	12	—
Larceny:		
Of Automobiles	3	—
Of Cattle	1	—
Grand Larceny	8	—
Embezzlement	1	1
Forgery, Counterfeiting and Kindred Offenses....	13	—
Perjury	1	—
Bastardy	1	—
Abortion	1	—
Desertion and Withholding Support from Wife and Children	5	—
Larceny of Hogs	4	—
Aiding, Concealment Stolen Property	4	—
Slot Machine Seizure	1	—
Keeping Gambling Room	1	—
Operating House of Ill Fame	3	—
Hit and Run Driver	3	—
Procuring Unmarried Female Under 16 for Prostitution	1	—
Manufacture of Liquor Without License	2	—
Unlawfully Practicing Medicine and Using Title of Doctor	1	—
Failure Motor Vehicle Stop, Render Aid.....	1	—
Receiving Stolen Property	4	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	2	—
Bond Estreature Proceedings	4	—
Habeas Corpus Hearings Attended	6	—

Respectfully Submitted,

MURRAY SAMS,
State Attorney.

VOLUSIA:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	6	—
Second Degree	3	—
Manslaughter	2	—
Robbery:		
Armed	7	—
Unarmed	1	—
Assaults:		
With intent to Commit Felony	12	—
Other Assaults	3	1
Burglary and Kindred Offenses	37	1
Larceny:		
Of Automobiles	5	—
Of Cattle	1	—
Grand Larceny	20	2
Embezzlement:		
Public Institutions	2	—
Forgery, Counterfeiting and Kindred Offenses...	14	1
Crime Against Nature	2	—
Desertion and Withholding Support from Wife and Children	5	—
Bastardy	8	1
Possessing Gambling Devices	3	—
Removing Property Under Lien	10	—
Maliciously Cutting Fence	1	—
Enticing Female to Leave Home	2	—
Failure of Motor Vehicle to Stop	1	—
Concealing Stolen Property	9	—
Conspiracy to Defraud	1	—
Accessory After Fact	1	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	68	—
Bond Validation Proceedings	10	—
Bond Estreature Proceedings	6	—
Criminal Hearings Attended and Investigations..	98	—
Habeas Corpus Hearings Attended	24	—

Respectfully Submitted,

MURRAY SAMS,
State Attorney.

EIGHTH JUDICIAL CIRCUIT

Alachua County
Baker County
Bradford County

Gilchrist County
Levy County
Union County

ALACHUA:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	17	1
Second Degree	5	—
Robbery:		
Armed	1	—
Unarmed	1	—
Assaults:		
With intent to Commit Felony	26	—
Other Assaults	4	—
Arson and Kindred Offenses	1	—
Burglary and Kindred Offenses	39	1
Larceny:		
Of Automobiles	10	1
Of Cattle	12	—
Kindred Offenses	26	2
Embezzlement	9	—
False Pretenses and Kindred Offenses	2	—
Forgery, Counterfeiting and Kindred Offenses.....	17	—
Offenses Against Public Revenue	11	—
Resisting Arrest, etc.	5	—
Adultery, Fornication, etc.	3	—
Desertion and Withholding Support from Wife and Children	6	—
Hit and Run	5	—
Issuing Worthless Check	1	—
Cruel and Inhuman Treatment of Convicts.....	2	—
Second Conviction of Felony	2	—
Shooting Into Dwelling	4	—
Disposing of Property Under Lien	4	—
Receiving Stolen Property	3	1

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	25	—
Bond Validation Proceedings	4	—
Criminal Hearings Attended	43	—
Habeas Corpus Hearings Attended	9	—
Other Cases Not Enumerated Handled by State Attorney	4	—

Respectfully submitted,

T. E. DUNCAN,
State Attorney.

BAKER:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	6	1
Mayhem	1	—

Assaults:		
With intent to Commit Felony	4	—
Other Assaults	2	—
Arson and Kindred Offenses	2	—
Larceny:		
Of Cattle	1	—
Kindred Offenses	1	—
Embezzlement:		
Public Officers	1	1
False Pretenses and Kindred Offenses	1	—
Trespasses, Injuring Buildings, etc.	3	—
Incest	2	—
Desertion and Withholding Support from Wife and Children	6	—
Lottery	2	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	4	—
Criminal Hearings Attended	12	—
Habeas Corpus Hearings Attended	1	—
Other Cases Not Enumerated Handled by State Attorney	11	—

Respectfully submitted,

T. E. DUNCAN,
State Attorney.

BRADFORD:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	2	—
Manslaughter	1	—
Robbery:		
Armed	1	—
Unarmed	1	—
Assaults:		
With intent to Commit Felony	2	—
Other Assaults	3	—
Burglary and Kindred Offenses	6	—
Larceny:		
Of Automobiles	3	—
Kindred Offenses	5	—
Embezzlement	2	—
Forgery, Counterfeiting and Kindred Offenses....	8	—
Trespasses, Injuring Buildings, etc.	2	—
Incest	1	1
Desertion and Withholding Support from Wife and Children	1	—
Culpable Negligence	2	—
Wilfully Cutting Wire Fence	1	—
Transfer Property Without Certificate	10	—
Lottery	5	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court....	5	—
Bond Validation Proceedings	2	—
Bond Estreature Proceedings	12	Cash Bonds Estreated

Criminal Hearings Attended	15	—
Habeas Corpus Hearings Attended	12	—
Other Cases Not Enumerated Handled by State Attorney	6	—

Respectfully submitted,

T. E. DUNCAN,
State Attorney.

GILCHRIST:

	Information and Indictments	Verdicts of Not Guilty Returned
Larceny:		
Of Automobiles	1	—
Of Hogs	1	—
Adultery, Fornication, etc.	1	—
Breaking and Entering and Grand Larceny.....	1	1
Impersonating an Officer	1	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	3	—
Criminal Hearings Attended	7	—
Habeas Corpus Hearings Attended	1	—
Other Cases Not Enumerated Handled by State Attorney	4	—

Respectfully submitted,

T. E. DUNCAN,
State Attorney.

LEVY:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	5	—
Second Degree	1	—
Third Degree	1	—
Robbery:		
Armed	2	—
Assaults	7	—
Larceny:		
Of Automobiles	1	—
Kindred Offenses	6	—
Trespasses, Injuring Buildings, etc.	2	—
Resisting Arrest, etc.	1	—
Desertion and Withholding Support from Wife and Children	1	—
Breaking and Entering	8	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	5	—
Bond Validation Proceedings	2	Bonds validated
Criminal Hearings Attended	15	—
Habeas Corpus Hearings Attended	4	—

Respectfully submitted,

T. E. DUNCAN,
State Attorney.

UNION:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	3	—
Second Degree	1	—
Manslaughter	1	—
Rape	2	—
Robbery:		
Unarmed	1	—
Assaults:		
Murder	4	1
Larceny:		
Of Cattle	1	—
Kindred Offenses	2	—
Desertion and Withholding Support from Wife and Children	2	—
Conducting a Lottery and Possession of Lottery Tickets	1	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	2	—
Bond Validation Proceedings	1	—
Criminal Hearings Attended	8	—
Habeas Corpus Hearings Attended	6	—
Other Cases Not Enumerated Handled by State Attorney	9	—

Respectfully submitted,

T. E. DUNCAN,
State Attorney.

NINTH JUDICIAL CIRCUIT

Brevard County
Indian River County
Martin County
Okeechobee CountyOrange County
Osceola County
Saint Lucie County
Seminole County

BREVARD:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	7	2
Manslaughter	1	—
Robbery:		
Armed	3	—
Unarmed	2	—
Assaults:		
With intent to Commit Felony	14	1
Aggravated	9	—
Burglary and Kindred Offenses	29	2
Larceny:		
Of Automobiles	8	—
Of Cattle	4	—
Kindred Offenses	5	—
Embezzlement	1	—
False Pretenses and Kindred Offenses	3	—
Forgery, Counterfeiting and Kindred Offenses....	2	—

Incest	1	—
Crime Against Nature	1	—
Desertion and Withholding Support from Wife and Children	10	—
Hit and Run	2	—
Removing Property Under Lien	1	—
Receiving Stolen Property	2	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	2	Dismissed
Criminal Hearings Attended	27	—
Habeas Corpus Hearings Attended	15	—

Respectfully submitted,

MURRAY W. OVERSTREET,
State Attorney.

INDIAN RIVER:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	2	—
Second Degree	1	—
Manslaughter	1	—
Assaults:		
With intent to Commit Felony	6	—
Burglary and Kindred Offenses	15	3.
Larceny:		
Of Automobiles	3	1
Kindred Offenses	6	1
Forgery, Counterfeiting and Kindred Offenses...	1	1
Adultery, Fornication, etc.	1	—
Bigamy	1	—
Desertion and Withholding Support from Wife and Children	2	1
Obtaining, Not by Fraud	1	—
Selling Narcotics	1	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	1	Affirmed
Bond Validation Proceedings	6	Validated
Habeas Corpus Hearings Attended	1	Remanded

Respectfully submitted,

MURRAY W. OVERSTREET,
State Attorney.

MARTIN:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	1	—
Assaults:		
With intent to Commit Felony	6	—
Burglary and Kindred Offenses	15	2

Larceny:		
Of Automobiles	2	—
Kindred Offenses	3	1
Forgery, Counterfeiting and Kindred Offenses....	8	—
Intercourse with Female Under 18	1	—
Fraud	1	—
Obstructing R. R. Train	1	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	1	Dismissed
Bond Validation Proceedings	4	Validated

Respectfully submitted,

MURRAY W. OVERSTREET,
State Attorney.

OKEECHOBEE:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	1	—
Assaults:		
With intent to Commit Felony	1	—
Burglary and Kindred Offenses	2	—
Larceny:		
Kindred Offenses	1	—
Forgery, Counterfeiting and Kindred Offenses....	3	—
Gambling	1	—
Fraud	1	—

Respectfully submitted,

MURRAY W. OVERSTREET,
State Attorney.

ORANGE:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	6	—
Second Degree	2	—
Representation Insane Persons	6	—
Restoration Sanitary Hearings	12	—
Investigations	26	—

Respectfully submitted,

MURRAY W. OVERSTREET,
State Attorney.

OSCEOLA:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	3	—
Second Degree	1	—
Robbery:		
Armed	1	—

Assaults:		
With intent to Commit Felony	2	—
Larceny:		
Of Automobiles	1	1
Of Cattle	1	—
Kindred Offenses	3	—
Forgery, Counterfeiting and Kindred Offenses...	3	—
Trespasses, Injuring Buildings, etc.	5	—
Desertion and Withholding Support from Wife and Children	2	—
Breaking and Entering—No Information.....	2	—
Assault—No Information	3	—
Manslaughter—No Information	1	—
Perjury—No Information	1	—
Investigations Attended	27	—
Inquests Attended (Throughout the Circuit).....	7	—

OTHER CASES HANDLED

	Number	Disposition
Habeas Corpus Hearings Attended (Entire Ct.)..	15	—
Bond Validations (Entire Ct.)	54	—

Respectfully submitted,

MURRAY W. OVERSTREET,
State Attorney.

SAINT LUCIE:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	4	—
Second Degree	1	—
Manslaughter	2	1
Robbery:		
Armed	2	—
Unarmed	2	—
Assaults:		
With intent to Commit Felony	8	1
Other Assaults	2	—
Burglary and Kindred Offenses	8	1
Larceny:		
Of Automobiles	8	—
Kindred Offenses	2	—
Embezzlement	1	—
Forgery, Counterfeiting and Kindred Offenses...	7	—
Desertion and Withholding Support from Wife and Children	1	—
Lottery	2	—
Narcotics	1	—
Shooting Into House	1	1

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	5	—
Bond Estreature Proceedings	1	—

Respectfully submitted,

MURRAY W. OVERSTREET,
State Attorney.

SEMINOLE:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	6	—
Second Degree	1	—
Manslaughter	3	—
Rape	1	—
Robbery:		
Unarmed	5	—
Assaults:		
With intent to Commit Felony	21	3
Burglary and Kindred Offenses	17	1
Larceny:		
Of Automobiles	5	—
Of Cattle	2	—
False Pretenses and Kindred Offenses	1	—
Forgery, Counterfeiting and Kindred Offenses....	8	—
Trespasses, Injuring Buildings, etc.	1	—
Crime Against Nature	1	—
Desertion and Withholding Support from Wife and Children	9	—
Removing Property Under Lien	1	—
Receiving Stolen Property	3	—
Culpable Negligence	1	—
Unlawful Carnal Intercourse	1	—
Unlawfully Cutting Timber	1	—

OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	39	—
Habeas Corpus Hearings Attended	9	—

Respectfully submitted,

MURRAY W. OVERSTREET,
State Attorney.

TENTH JUDICIAL CIRCUIT

Hardee County

Polk County

Highlands County

HARDEE:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
Second Degree	4	—
Assaults:		
With intent to Commit Felony	3	—
Other Assaults	17	—
Larceny:		
Of Automobiles	6	—
Embezzlement:		
Public Officers	1	—
False Pretenses and Kindred Offenses	2	—
Forgery, Counterfeiting and Kindred Offenses....	8	—
Trespasses, Injuring Buildings, etc.	1	—
Perjury	1	—
Adultery, Fornication, etc.	2	—
Crime Against Nature	1	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	13	—
Criminal Hearings Attended	9	—
Habeas Corpus Hearings Attended	6	—

Respectfully Submitted,

GRADY BURTON,
State Attorney.

HIGHLANDS:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	2	1
Second Degree	1	—
Manslaughter	3	—
Assaults:		
With intent to Commit Felony	11	2
Other Assaults	23	4
Arson and Kindred Offenses	19	—
Larceny:		
Kindred Offenses	6	—
Embezzlement	3	—
Forgery, Counterfeiting and Kindred Offenses....	5	—
Trespasses, Injuring Buildings, etc.	2	—
Resisting Arrest, etc.	4	2
Adultery, Fornication, etc.	4	2
Killing Animal of Another	1	—
Shooting in Dwelling House	1	—
Disposing Personal Property	1	—
Prison Escape	6	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	3	—
Habeas Corpus Hearings Attended	7	—

Respectfully submitted,

GRADY BURTON,
State Attorney.

POLK:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	18	2
Second Degree	2	—
Mayhem	3	—
Rape	3	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	61	—
Bond Validation Proceedings	28	—
Habeas Corpus Hearings Attended	26	—

Respectfully submitted,

GRADY BURTON,
State Attorney.

ELEVENTH JUDICIAL CIRCUIT

Dade County

Monroe County

DADE:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	45	3
Second Degree	3	—
Manslaughter	4	—
Rape	6	2
Robbery:		
Unarmed	2	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	10	—
Bond Validation Proceedings	12	—
Bond Estreature Proceedings	18	—
Criminal Hearings Attended	153	—
Habeas Corpus Hearings Attended	61	—
Restoration of Sanity	16	—
Bastardy Cases	20	—
Suicides	60	—
Accidental Deaths	36	—
Justifiable Homicides	36	—

Respectfully submitted,

G. A. WORLEY,
State Attorney.

MONROE:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	1	—
Manslaughter	1	—
Rape	1	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	5	Decree entered

Respectfully submitted,

G. A. WORLEY,
State Attorney.

TWELFTH JUDICIAL CIRCUIT

Charlotte County
Collier County
DeSoto County
Glades CountyHendry County
Lee County
Manatee County
Sarasota County

CHARLOTTE:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
Manslaughter	1	—
Burglary and Kindred Offenses	7	—

Larceny:		
Of Cattle	4	1
Forgery, Counterfeiting and Kindred Offenses....	2	—
Shooting Into Dwelling	1	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	1	Pending

Respectfully submitted,

CLYDE H. WILSON,
State Attorney.

COLLIER:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	2	—
Second Degree	1	—
Manslaughter	2	—
Rape	1	—
Robbery:		
Armed	1	—
Assaults:		
With intent to Commit Felony	3	—
Other Assaults	3	1
Larceny:		
Of Automobiles	2	—
False Pretenses and Kindred Offenses	1	—
Forgery, Counterfeiting and Kindred Offenses....	2	—
Adultery, Fornication, etc.	4	—
Liquor Law Violations	2	—
Conducting Lottery	1	—

Respectfully submitted,

CLYDE H. WILSON,
State Attorney.

DESOTO:

	Information and Indictments	Verdicts of Not Guilty Returned
Robbery:		
Armed	2	—
Assaults:		
With intent to Commit Felony	5	2
Burglary and Kindred Offenses	14	1
Larceny:		
Of Automobiles	3	—
Kindred Offenses	2	—
Embezzlement	1	—
False Pretenses and Kindred Offenses	1	—
Forgery, Counterfeiting and Kindred Offenses....	2	—
Perjury	1	1
Resisting Arrest, etc.	1	—
Desertion and Withholding Support from Wife and Children	3	—
Lewd and Lascivious Behavior	1	—
Buying Stolen Property	1	1

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	5	Reversed 3 Affirmed 2
Habeas Corpus Hearings Attended	7	—

Respectfully submitted,

CLYDE H. WILSON,

State Attorney.

GLADES:

	Information and Indictments	Verdicts of Not Guilty Returned
Assaults:		
With intent to Commit Felony	3	—
Aggravated Assault	3	—
Burglary and Kindred Offenses	4	—
Larceny:		
Kindred Offenses	1	1

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	1	Affirmed

Respectfully submitted,

CLYDE H. WILSON,

State Attorney.

HENDRY:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
Second Degree	3	1
Manslaughter	1	—
Rape	1	—
Assaults:		
With intent to Commit Felony	1	1
Burglary and Kindred Offenses	4	—
Larceny:		
Of Automobiles	4	—
Kindred Offenses	1	—
Pledging Mortgaged Property	1	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	4	—

Respectfully submitted,

CLYDE H. WILSON,

State Attorney.

LEE:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
Second Degree	5	—
Manslaughter	2	1
Robbery:		
Armed	4	—
Unarmed	3	—

Assaults:		
With intent to Commit Felony	8	—
Burglary and Kindred Offenses	36	—
Larceny:		
Of Automobiles	3	—
Of Cattle	8	1
Embezzlement	2	—
False Pretenses and Kindred Offenses	2	1
Forgery, Counterfeiting and Kindred Offenses....	7	—
Assisting Person to Escape	4	2
Worthless Check	1	—
Conducting Lottery	7	1
Obtaining Narcotics by Fraud	1	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	2	Completed
Criminal Hearings Attended	15	—
Habeas Corpus Hearings Attended	3	—
Other Cases Not Enumerated Handled by State Attorney	1	—

Respectfully submitted,

CLYDE H. WILSON,
State Attorney.

MANATEE:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	3	—
Second Degree	3	—
Manslaughter	3	2
Robbery:		
Armed	3	—
Unarmed	6	—
Assaults:		
With intent to Commit Felony	7	—
Arson and Kindred Offenses	2	—
Burglary and Kindred Offenses	18	—
Larceny:		
Of Automobiles	2	—
Kindred Offenses	12	1
Forgery, Counterfeiting and Kindred Offenses....	3	—
Adultery, Fornication, etc.	1	—
Desertion and Withholding Support from Wife and Children	4	—
Operation Gambling House	4	—
Violation Securities Act	5	—
Worthless Check	1	—
Conducting Lottery	10	1

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	3	Affirmed
Criminal Hearings Attended	15	—
Habeas Corpus Hearings Attended	6	—

Respectfully submitted,

CLYDE H. WILSON,
State Attorney.

SARASOTA:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	1	1
Second Degree	2	1
Manslaughter	1	—
Robbery:		
Armed	5	1
Unarmed	2	—
Assaults:		
With intent to Commit Felony	4	—
Burglary and Kindred Offenses	33	1
Larceny:		
Of Automobiles	3	1
Kindred Offenses	11	1
Forgery, Counterfeiting and Kindred Offenses....	7	—
Adultery, Fornication, etc.	2	1
Bigamy	1	—
Illegal Practice of Medicine	4	—
Operating Gambling House	5	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	2	Completed
Bond Estreature Proceedings	4	Completed
Habeas Corpus Hearings Attended	5	—

Respectfully submitted,

CLYDE H. WILSON,
State Attorney.

THIRTEENTH JUDICIAL CIRCUIT

HILLSBOROUGH:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	16	1
Rape	5	—
Contempt Proceedings	2	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court....	11	—
Habeas Corpus Hearings Attended	45	—
Other Cases Not Enumerated Handled by State Attorney	10	—

Respectfully submitted,

J. REX FARRIOR,
State Attorney.

FOURTEENTH JUDICIAL CIRCUIT

Bay County
Calhoun County
Gulf County

Holmes County
Jackson County
Washington County

BAY:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	1	—
Second Degree	5	—
Manslaughter	1	1
Robbery:		
Armed	1	—
Assaults:		
With intent to Commit Felony	13	2
Arson and Kindred Offenses	2	—
Burglary and Kindred Offenses	17	4
Larceny:		
Of Automobiles	7	—
Of Cattle	1	—
Kindred Offenses	26	5
Embezzlement	1	—
Forgery, Counterfeiting and Kindred Offenses	15	1
Perjury	1	—
Adultery, Fornication, etc.	8	1
Bigamy	2	—
Crime Against Nature	1	1
Desertion and Withholding Support from Wife and Children	11	7
Violating Traffic Laws	3	—
Operating Automobile While Drunk	1	1
Hit and Run Driving	5	2
Removing Property Under Lien	1	1
Injuring Personal Property	1	—
Keeping House of Ill Fame	1	1
Maiming an Animal	1	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	4	—
Criminal Hearings Attended	28	—
Habeas Corpus Hearings Attended	2	—

Respectfully submitted,

L. D. McRAE,
State Attorney.

CALHOUN:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	2	1
Second Degree	2	—
Robbery:		
Armed	1	—
Assaults:		
With intent to Commit Felony	4	—
Other Assaults	3	—

Burglary and Kindred Offenses	1	—
Larceny:		
Kindred Offenses	4	4
Forgery, Counterfeiting and Kindred Offenses....	1	—
Incest	1	1
Desertion and Withholding Support from Wife and Children	4	—
Violating Traffic Laws	2	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	1	Reversed
Criminal Hearings Attended	4	—

Respectfully submitted,

L. D. McRAE,
State Attorney.

GULF:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	3	2
Second Degree	1	—
Manslaughter	1	—
Assaults	6	2
Burglary and Kindred Offenses	13	3
Larceny:		
Of Automobiles	1	—
Kindred Offenses	10	3
Embezzlement	1	1
Forgery, Counterfeiting and Kindred Offenses....	1	—
Offenses Against Public Revenue	2	1
Adultery, Fornication, etc.	2	2
Violation Liquor Law, Second Offense	1	—
Desertion and Withholding Support from Wife and Children	3	—
Hit and Run Driver	1	1
Unlawful Practice of Medicine	1	—
Attempted Burglary	1	1

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	1	Pending
Criminal Hearings Attended	2	1 Bound Over
Habeas Corpus Hearings Attended	1	—

Respectfully submitted,

L. D. McRAE,
State Attorney.

HOLMES:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	1	—
Second Degree	5	2
Assaults:		
With intent to Commit Felony	6	1

Arson and Kindred Offenses	2	—
Burglary and Kindred Offenses	4	—
Larceny:		
Of Automobiles	1	—
Kindred Offenses	2	1
Embezzlement	1	—
False Pretenses and Kindred Offenses	1	—
Forgery, Counterfeiting and Kindred Offenses	4	1
Trespasses, Injuring Buildings, etc.	1	—
Resisting Arrest, etc.	1	—
Adultery, Fornication, etc.	2	—
Bigamy	1	—
Desertion and Withholding Support from Wife and Children	5	1
Disposing of Mortgaged Property	4	3
Operating Auto While Drunk	2	1
Possessing Untaxed Whiskey	2	1
Unlawful Practice of Medicine	1	1
Shooting Into Dwelling House	1	—

OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	14	—

Respectfully submitted,

L. D. McRAE,
State Attorney.

JACKSON:

	Information and Indictments	Verdicts or Not Guilty Returned
Homicide:		
First Degree	6	—
Second Degree	8	—
Manslaughter	3	1
Robbery:		
Armed	3	—
Assaults:		
With intent to Commit Felony	19	3
Burglary and Kindred Offenses	18	2
Larceny:		
Of Automobiles	1	—
Of Cattle	3	—
Kindred Offenses	16	6
False Pretenses and Kindred Offenses	1	—
Forgery, Counterfeiting and Kindred Offenses	18	1
Perjury	3	2
Resisting Arrest, etc.	2	1
Adultery, Fornication, etc.	4	1
Bigamy	2	—
Desertion and Withholding Support from Wife and Children	17	5
Traffic Violations	2	—
Violation of Health Laws	1	—
Maiming an Animal	1	1
Unlawful Sexual Intercourse	2	2
Second Felcny	1	—
Disposing of Mortgaged Property	1	1

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	5	—
Bond Validation Proceedings	3	—
Criminal Hearings Attended	20	—
Habeas Corpus Hearings Attended	4	—

Respectfully submitted,

L. D. McRAE,
State Attorney.

WASHINGTON:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
Second Degree	1	—
Manslaughter	1	—
Rape	1	—
Assaults:		
With intent to Commit Felony	7	3
Arson and Kindred Offenses	3	1
Burglary and Kindred Offenses	5	1
Larceny:		
Of Cattle	1	1
Kindred Offenses	9	4
Embezzlement:		
Public Officers	7	3
False Pretenses and Kindred Offenses	1	1
Forgery, Counterfeiting and Kindred Offenses....	3	—
Trespasses, Injuring Buildings, etc.	1	—
Adultery, Fornication, etc.	3	1
Bigamy	2	—
Desertion and Withholding Support from Wife and Children	6	—
Violating Traffic Laws	3	—
Unlawful Carnal Intercourse	1	—
Unlawfully Burning Woods	1	—
Unlawfully Maiming an Animal	1	1

OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	4	—

Respectfully submitted,

L. D. McRAE,
State Attorney

FIFTEENTH JUDICIAL CIRCUIT

Broward County

Palm Beach County

BROWARD:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	11	2
Second Degree	1	—
Manslaughter	2	—

Mayhem	1	—
Robbery:		
Armed	3	—
Assaults:		
With intent to Commit Felony	7	1
Burglary and Kindred Offenses	50	—
Larceny:		
Of Automobiles	7	—
Of Cattle	3	—
Kindred Offenses	7	1
Embezzlement	3	—
Forgery, Counterfeiting and Kindred Offenses....	5	—
Perjury	1	—
Resisting Arrest, etc.	1	—
Conspiracy	2	—
Adultery, Fornication, etc.	2	—
Bigamy	1	—
Desertion and Withholding Support from Wife and Children	2	—
Carnal Intercourse with Female Under 18.....	1	—
Keeping Gambling House	3	—
Throwing Explosive at Dwelling	1	—
Shooting at Dwelling	1	—
Worthless Check	2	—
Narcotic Violations	7	—

OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	6	—
Habeas Corpus Hearings Attended	1	—
Other Cases Not Enumerated Handled by State Attorney	10	—

Respectfully submitted,

JOSEPH S. WHITE,
State Attorney.

PALM BEACH:

	Information and Indictments	Verdicts of Not Guilty Returned
Homicide:		
First Degree	17	3
Second Degree	5	—
Manslaughter	1	—
Rape	1	—
Assaults	1	—
Possessing Pistol	1	—
Wrongful Combination Against Workman	1	—

OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court	6	3 pending, 3 dismissed
Bond Validation Proceedings	9	—
Bond Estreasure Proceedings	7	2 estreatures, 5 vacated
Habeas Corpus Hearings Attended.....	13	—
Other Cases Not Enumerated Handled by State Attorney	3	—

Respectfully submitted,

JOSEPH S. WHITE,
State Attorney.

REPORTS OF COUNTY SOLICITORS FOR YEARS 1941-1942, INCLUSIVE

DADE—

CRIMINAL COURT OF RECORD AND COURT OF CRIMES:

	Number of Cases	Acquittals
Abortion	1	—
Adultery and Fornication	16	—
Aggravated Assault	184	10
Arson	8	—
Assault and Battery	213	16
Assault to Commit a Felony	91	5
Beating Board Bill	24	3
Bigamy	7	—
Breaking and Entering	562	3
Bribery	2	—
Contempts	4	—
Contributing to Delinquency of Minor	46	7
Crime Against Nature	22	1
Conspiracy	2	—
Driving Auto Drunk	137	7
Drunk	363	3
Embezzlement Less Than \$50.00	28	3
Embezzlement	119	8
Embezzlement by Public Officials	2	—
False Pretenses	33	—
Forgery	57	—
Gambling (Court of Crimes)	45	—
Gambling and Gambling Houses (Criminal Court)	272	20
Game Laws	124	1
Incest	5	—
Indecent Exposure	15	—
Larceny Less Than \$50.00	303	10
Larceny	371	6
Larceny of Automobile	263	2
Licenses, Occupational	64	2
Lien Laws	60	2
Liquor (Court of Crimes)	34	1
Liquor (Criminal Court)	313	7
Lottery	13	—
Malicious Mischief	22	3
Manslaughter	21	6
Mayhem	8	—
Miscellaneous (Court of Crimes)	179	9
Miscellaneous (Criminal Court)	399	7
Motor Vehicle Laws	322	5
Murder (Second Degree)	5	2
Narcotics	80	1
Non-Support	49	1
Nuisance	8	2
Obscenity and Profanity	14	1
Perjury	9	—
Rape (Statutory)	17	1
Receiving Stolen Property (Court of Crimes)	4	—
Receiving Stolen Property (Criminal Court)	103	4
Reckless Driving	308	8

Robbery	176	16
Slot Machines	55	—
Threatening Communications	2	—
Trespass	20	1
Using Automobile	19	1
Vagrancy	362	27
Venereal Disease	156	5
Weapons	101	1
Worthless Check	289	2
Zoning and Sanitary	66	—

Respectfully submitted,

ROBT. R. TAYLOR,
County Solicitor.

DUVAL—

CRIMINAL COURT OF RECORD:

	Number of Cases	Acquittals
Homicide:		
Second Degree	10	5
Manslaughter	14	4
Robbery:		
Armed	16	2
Unarmed	31	4
Assaults:		
With intent to Commit Felony	37	12
Other Assaults	168	12
Arson and Kindred Offenses	2	—
Burglary and Kindred Offenses	142	5
Larceny:		
Of Automobiles	60	7
Kindred Offenses	405	17
Embezzlement	28	5
Forgery, Counterfeiting and Kindred Offenses	41	1
Trespasses, Injuring Buildings, etc.	10	5
Adultery, Fornication, etc.	1	—
Bribery	2	1
Crime Against Nature	3	—
Violation Liquor Law, Second Offense	30	13
Desertion and Withholding Support from Wife and Children	7	—
Violation of Narcotic Law	12	—
Carrying Concealed Weapons	10	—
Traffic Cases, Careless Driving, Passing School Bus, etc.	309	35
Using Car Without Owner's Consent	16	—
Receiving Stolen Property	8	1
Escape	7	—
Driving While Intoxicated	75	10
Violation Florida Compensation Law	46	1
Violation Game Laws, Hunting and Fishing	10	—
Fourth Conviction of a Felony	2	—
Doing Business Without a License	7	—

OTHER CASES HANDLED

	Number	Disposition
Bond Estreature Proceedings	299	—

Respectfully submitted,

HARRY H. MARTIN,
County Solicitor.

ESCAMBIA—

CRIMINAL COURT OF RECORD:

	Number of Cases	Acquittals
Homicide:		
Second Degree	6	4
Manslaughter	14	2
Robbery:		
Armed	7	—
Unarmed	8	—
Assaults:		
With intent to Commit Felony	42	2
Other Assaults	293	26
Arson and Kindred Offenses	1	1
Burglary and Kindred Offenses	5	—
Larceny:		
Of Automobiles	22	—
Of Cattle	5	—
False Pretenses and Kindred Offenses	29	1
Forgery, Counterfeiting and Kindred Offenses...	42	—
Trespasses, Injuring Buildings, etc.	10	1
Perjury	3	—
Resisting Arrest, etc.	15	—
Adultery, Fornication, etc.	4	—
Bigamy	2	—
Crime Against Nature	3	—
Desertion and Withholding Support from Wife and Children	25	1
Child Labor Law	26	—
Grand Larceny	37	5
Traffic Violations	224	11
Vagrancy	581	20
Driving While Drunk	169	5
Drunkenness	806	6
Breaking and Entering	93	1
Petit Larceny	271	8
Game Law	19	—
Malicious Mischief	17	1
Doing Business Without License	22	—
Miscellaneous Crimes Not Otherwise Enumerated	471	17

OTHER CASES HANDLED

	Number	Disposition
Bond Estreature Proceedings	15	—

Respectfully submitted,

FORSYTH CARO,
County Solicitor.

HILLSBOROUGH—

CRIMINAL COURT OF RECORD:

	Number of Cases	Acquittals
Homicide:		
Murder, Second Degree	7	3
Manslaughter	10	7
Mayhem	2	2

Assaults:		
With intent to commit felony	14	4
Asst. to Murder	28	5
Aggravated Assault	79	19
Assault and Battery	20	8
Robbery:		
Armed	24	5
Unarmed	11	4
Arson	1	—
Burglary	151	9
Larceny:		
Of Automobile	46	4
Of Cattle	2	1
Of Mule	1	1
Of Hogs	1	1
Grand Larceny	35	4
Petit Larceny	145	18
Larceny of Timber	2	1
Lewd and Lascivious Behavior	7	5
Embezzlement	23	5
False Pretenses	6	2
Bribery	1	1
Bigamy	3	2
Forgery	22	3
Entering, Without Breaking	9	—
Incest	2	1
Adultery	2	1
Attempts to Commit Felony	5	1
Burning Forest, Woods, etc.	2	2
Beating Way on Train	33	—
Burial Without Permit	1	0
Carnal Intercourse with Unmarried Female		
Under 18 Years	3	3
Crime Against Nature	7	1
Contributing to Delinquency of Minor	6	4
Cruelty to Children	3	2
Carrying Concealed Weapons	5	1
Driving While Drunk	256	35
Being Drunk	105	7
Beauty Culture Law Violations	3	2
Drivers' License Law Violations	10	3
Dentist Law Violations	4	2
Destroying Personal Property	3	—
Desertion and Non-support	6	3
Escape	17	—
Falsifying Public Record	1	—
Failing to Register as Known Criminal	9	1
Florida Securities Commission Act Violation	1	—
Improper Exhibition of Firearms	4	1
Gambling Law Violations	67	35
Game Law Violations	1	—
Indecent Exposure	2	—
Killing Animal of Another	2	2
Liquor Law Violations	44	13
Narcotic Law Violations	2	1
Obtaining Lodging with Intent to Defraud	1	—
Operating a Nuisance	2	1
Operating House of Ill-fame	1	1
Property Under Lien, Disposing, etc.	6	1
Pharmacy Law Violations	2	1
Reckless Driving	64	19
Taking and Using Car Without Consent	19	—

Traffic Law Violations:

Permitting Oper. MV Without Proper Equipment	2	—
Passing School Bus	2	1
Improper License Tag	3	—
Permitting Unauthorized Person to Drive	1	—
Trespassing	5	—
Unemployment Compensation Law Violations	46	—
Usury	3	3
Vagrancy	41	5
Worthless Checks	18	6

Respectfully submitted,

JOSEPH E. WILLIAMS,
County Solicitor.

MONROE—

CRIMINAL COURT OF RECORD:

	Number of Cases	Acquittals
Homicide:		
Manslaughter	1	1
Robbery:		
Unarmed	1	1
Assaults:		
With intent to Commit Felony	7	—
Other Assaults	127	5
Burglary and Kindred Offenses	10	2
Larceny:		
Of Automobiles	1	—
Kindred Offenses	30	2
Embezzlement	3	—
False Pretenses and Kindred Offenses	1	—
Trespasses, Injuring Buildings, etc.	20	2
Resisting Arrest, etc.	3	—
Adultery, Fornication, etc.	3	—
Crime Against Nature	2	—
Desertion and Withholding Support from Wife and Children	9	1
Vagrancy	286	6
No Motor Vehicle Tag	36	—
No Driver's License	70	—
Driving Under Influence of Liquor	43	2
Reckless Driving	65	2
Speeding	93	2
Obtaining Lodging with intent to Defraud	8	—
Profane, Obscene Language	45	2
Drunkenness	38	—
Temporarily Using Property of Others	13	—
Games of Chance, Gambling, etc.	58	—
Miscellaneous Crimes Not Otherwise Enumerated	80	1

OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	274	—

Respectfully submitted,

ALLAN B. CLEARE, JR.,
County Solicitor.

ORANGE—

CRIMINAL COURT OF RECORD:

	Number of Cases	Acquittals
Murder, Second Degree	4	2
Manslaughter	4	1
Robbery:		
Armed	3	1
Unarmed	2	—
Assaults:		
To Commit Felony	13	2
Other Assaults	54	3
Culpable Negligence	3	—
Aison	2	—
Burglary and Kindred Offenses	103	5
Larceny:		
Autos	14	—
Fruit	3	—
Grand Larceny	32	1
Petit Larceny	99	2
Temporary Use of Personal Property	12	1
Receiving Stolen Property	3	—
Embezzlement	14	1
Obtaining Property Under False Pretenses	15	—
Forgery and Uttering	57	1
Worthless Checks	35	—
Incest	2	—
Bigamy	2	—
Crime Against Nature	1	—
Other Sexual Offenses	4	—
Desertion, Withholding Support	12	—
Violation Liquor Law	4	—
Violation Fish and Game Law	14	—
Violation Narcotic Law	4	—
Violation Child Labor Law	2	—
Violation Gambling Laws	7	1
Concealed and Exhibiting Deadly Weapon	19	—
Trespasses	9	—
Conspiracy	1	—
Escapes	2	—
Doing Business Without License	4	—
False Affidavit	1	—
Skipping Bail Bond	1	—
Disposing Personal Property Under Lien	1	—
Violation Traffic and Motor Vehicle Laws	397	12
Drunk, Vagrancy, Open Profanity	208	—
Bond Estreature Proceedings	6	—
Criminal Hearings Attended	14	—
Habeas Corpus Hearings Attended	5	—

Respectfully submitted,

O. RAYMOND ELLARS,
County Solicitor.

PALM BEACH—

CRIMINAL COURT OF RECORD:

	Number of Cases	Acquittals
Attempted Rape	5	—
Attempted Breaking and Entering	4	—
Assault and Battery	31	—

Assault to Kill	65	2
Aggravated Assault	112	1
Armed Robbery	20	1
Attempted Armed Robbery	4	1
Attempted Larceny	1	—
Beating Board Bill	4	—
Breaking Seal on Gasoline Pump	1	—
Bigamy	1	—
Breaking and Entering	157	4
Conspiracy	1	1
Crime Against Nature	1	—
Concealed Weapons	16	—
Contempt of Court	1	—
Doing Business Without License	4	—
Drunk	106	1
Driving While Drunk	90	2
Entering Without Breaking	15	—
Embezzlement	17	—
Forgery	24	—
False Statement to Secure Compensation	2	—
Gambling	15	—
Grand Larceny	74	3
Intercourse Unmarried Female	3	3
Illegal Trespass	1	—
Issuing Worthless Checks	36	—
Indecent Exposure	2	—
Knowingly Marrying Husband of Another	1	—
Larceny of Automobile	50	3
Violation Liquor Laws	41	—
Living in Open Adultery	6	—
Manslaughter	8	—
Murder Second Degree	5	2
Maliciously Killing Dog	1	—
Malicious Mischief	6	—
No Driver's License	176	—
Withholding Support	88	—
Operating House Ill Fame	2	—
Obtaining Money by False Pretense	7	—
Permitting Unlicensed Person to Drive Motor Vehicle	9	—
Petit Larceny	123	1
Possessing Gambling Equipment	1	—
Passing School Bus	4	—
Possessing Obscene Literature	1	—
Perjury	2	—
Petition for Contempt	1	—
Receiving Stolen Property	4	—
Reckless Driving	123	1
Shooting on Highway Unlawfully	1	—
Shooting Into Dwelling	1	—
Traffic Violations, Miscellaneous	40	2
Temporarily Using Property of Another Without Consent	14	—
Unarmed Robbery	24	4
Violation Tick Law	1	—
Violation Game Laws	14	—
Violation Barber Act	2	—
Violation Real Estate Act	1	—
Vagrancy	63	—

Respectfully submitted,

W. E. ROEBUCK,
County Solicitor.

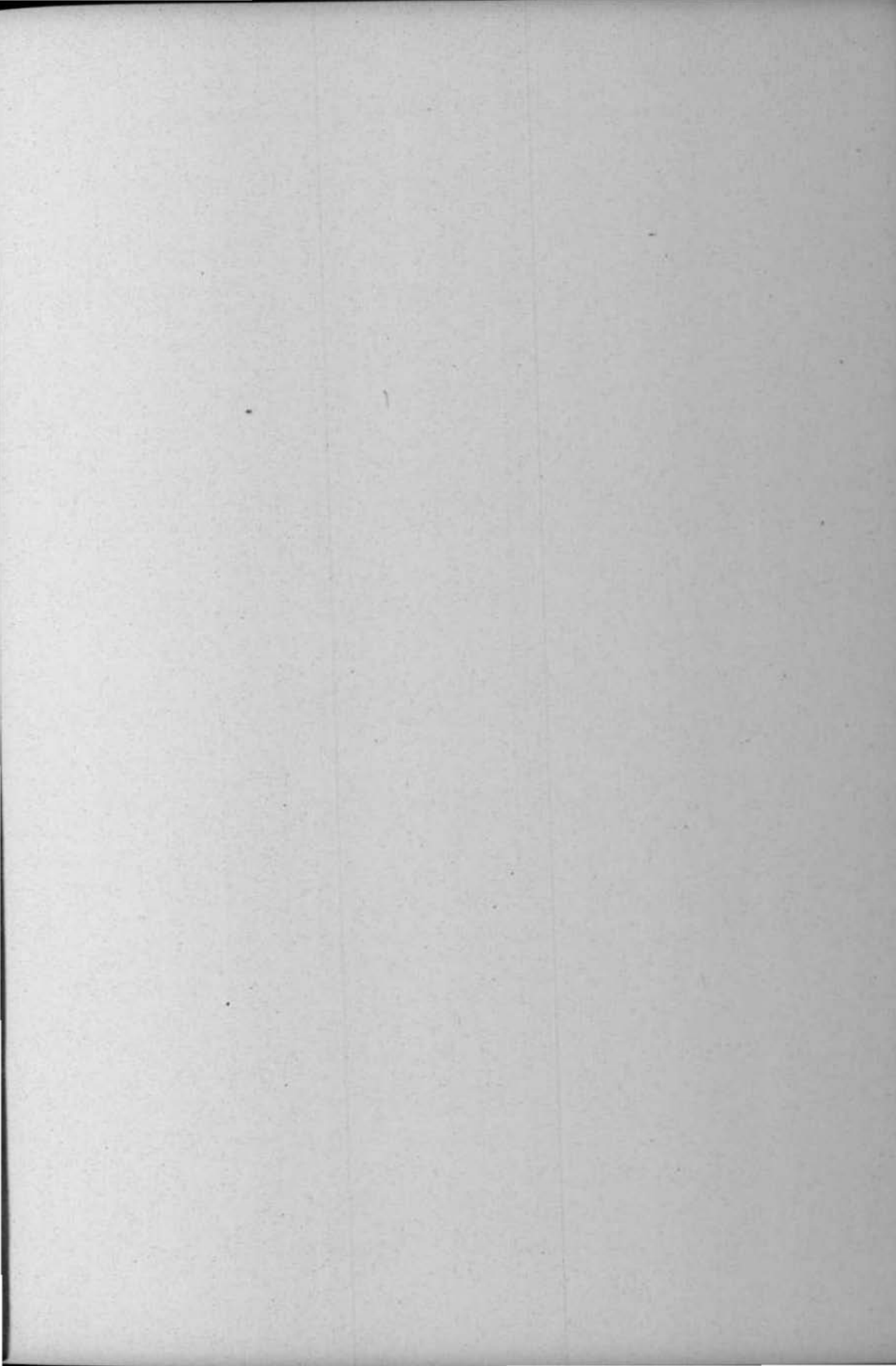
POLK—

CRIMINAL COURT OF RECORD:

	Number of Cases	Acquittals
Homicide:		
Second Degree	1	—
Manslaughter	2	—
Robbery:		
Armed	4	—
Unarmed	3	—
Assaults:		
With intent to Commit Felony	7	1
Other Assaults	153	7
Arson and Kindred Offenses	2	3
Burglary and Kindred Offenses	66	3
Larceny:		
Of Automobiles	20	1
Of Cattle	5	—
Kindred Offenses	134	3
Embezzlement	3	—
False Pretenses and Kindred Offenses	11	—
Forgery, Counterfeiting and Kindred Offenses	27	—
Trespasses, Injuring Buildings, etc.	25	2
Perjury	1	1
Bribery	1	—
Resisting Arrest, etc.	3	—
Adultery, Fornication, etc.	13	—
Incest	2	—
Bigamy	1	—
Crime Against Nature	4	—
Violation Liquor Law	185	21
Desertion and Withholding Support from Wife and Children	14	—
Driving Drunk	302	7
No Driver's License	175	1
Reckless Driving and Overloading	297	1
Disposing of Property Under Lien	12	—
Game and Fish Law Violations	34	—
Lottery and Gambling Violations	75	8
Habitual Criminal and Second Felony	2	—
Being Drunk and Vagrants	1062	1
Narcotic Violations	8	—
Other Miscellaneous Misdemeanors	69	3

Respectfully submitted,

GUNTER STEPHENSON,
County Solicitor.



REPORTS OF CLERKS OF CIRCUIT COURTS

COUNTY	Circuit	NAME OF CLERK	Number of Common Law Cases on File and Undisposed of January 1, 1941	Number of Chancery Cases on File and Undisposed of January 1, 1941	Number of Common Law Cases Filed During Biennium 1941-1942	Number of Chancery Cases Filed During Biennium 1941-1942	Number of Common Law Cases Disposed of During Biennium 1941-1942	Number of Chancery Cases Disposed of During Biennium 1941-1942	Number of All Other Cases of Special Proceedings, Such as Adoption, Free Dealers, et cetera, Disposed of by Court Order
Alachua.....	8th	Geo E. Evans.....	76	109	157	473	81	366	57
Baker.....	8th	C. W. Klein, Jr.....	1	0	22	224	10	206	2
Bay.....	14th	H. A. Pledger.....	45	54	99	345	57	220	30
Bradford.....	8th	A. J. Thomas.....	50	80	64	1,080	54	965	8
Brevard.....	9th	G. M. Simmons.....	33	54	99	616	95	554	19
Broward.....	15th	E. R. Bennett.....	572	194	233	781	196	650	not separated
Calhoun.....	14th	J. A. Peacock.....	8	50	43	113	31	82	3
Charlotte.....	12th	E. H. Scott.....	0	11	18	122	12	99	0
Citrus.....	5th	James E. Connor.....	4	18	9	32	8	16	0
Clay.....	4th	L. T. Ivey.....	3	8	10	16	6	11	4
Collier.....	12th	E. D. Scott.....	4	9	8	31	12	32	0
Columbia.....	3rd	Hugh B. Summers.....	450	444	66	182	42	118	9
Dade.....	11th	E. B. Leatherman.....	129	not reported	695	14,559	426	7,451	not separated
De Soto.....	12th	Mary M. Gwynn.....	4	34	10	124	14	76	17
Dixie.....	3rd	Stephen R. Langston..	0	26	33	132	22	98	8
Duval.....	4th	Elliot W. Butts.....	no record	no record	678	5,459	1,512	6,073	not separated
Escambia.....	1st	Langley Bell.....	70	131	541	765	478	611	158
Flagler.....	7th	Dale B. Brown.....	5	14	23	108	* 13	71	12
Franklin.....	2nd	W. P. Dodd.....	5	3	9	22	5	18	8
Gadsden.....	2nd	F. F. Morgan.....	3	1	30	101	18	70	18
Gilchrist.....	8th	Asa L. Harlee.....	6	13	8	14	10	11	8
Glades.....	12th	Mrs. D. S. Weeks.....	2	2	4	46	5	6	0
Gulf.....	14th	J. R. Hunter.....	2	1	29	67	21	54	2
Hamilton.....	3rd	Miss Thelma Lewis.....	19	24	17	101	9	81	3
Hardee.....	10th	R. Clyde Simmons.....	681	502	80	304	44	243	3
Hendry.....	12th	Wm. T. Hull.....	0	6	9	41	7	32	not reported
Hernando.....	5th	H. C. Mickler.....	7	19	22	72	15	53	not reported
Highlands.....	10th	H. T. Piety.....	573	586	50	398	36	354	0

Hillsborough...	13th	Chas. H. Pent.....	209	1,326	615	4,996	406	3,670	not reported
Holmes.....	14th	H. D. Howell.....	12	7	38	90	23	81	7
Indian River...	9th	Douglas Baker.....	148	165	41	105	25	76	13
Jackson.....	14th	Doe Grant.....	37	72	72	316	64	259	32
Jefferson.....	2nd	Clyde H. Sauls.....	3	6	12	46	4	32	5
Lafayette.....	3rd	Sidney C. Edwards...	13	45	14	45	9	33	3
Lake.....	5th	Geo. J. Dykes.....	1,381	1,017	187	330	114	346	not reported
Lee.....	12th	D. T. Farabee.....	22	70	32	308	34	268	37
Leon.....	2nd	Paul V. Lang.....	15	61	290	1,719	167	1,674	33
Levy.....	8th	Jack L. Meeks.....	43	88	25	102	23	73	12
Liberty.....	2nd	W. G. Larkins.....	0	0	25	35	25	35	0
Malison.....	3rd	D. F. Burnett, Jr....	122	137	45	176	15	119	not reported
Manatee.....	12th	Iveson Lloyd.....	not reported	not reported	188	451	90	283	29
Marion.....	5th	Carlyle Ausley.....	310	380	163	418	70	324	32
Martin.....	9th	J. R. Pomeroy.....	24	25	47	144	27	111	0
Monroe.....	11th	Ross C. Sawyer.....	10	38	42	599	28	480	45
Nassau.....	4th	T. W. Brown.....	17	57	30	88	21	74	8
Okaloosa.....	1st	Leron W. Rice.....	126	111	79	248	38	187	5
Okeechobee...	9th	Roy R. Raulerson...	18	8	19	64	10	26	not reported
Orange.....	9th	Clarence M. Gay.....	87	103	261	752	223	384	175
Osceola.....	9th	J. L. Overstreet.....	70	53	73	185	40	120	5
Palm Beach...	15th	J. A. Arnette.....	182	1,041	491	1,746	290	1,186	not separated
Pasco.....	6th	A. J. Burnside.....	111	249	25	250	14	171	not reported
Pinellas.....	6th	Ray E. Green.....	590	1,073	294	1,796	163	1,733	not separated
Polk.....	10th	D. H. Sloan, Jr....	74	179	300	115	1,731	1,256	151
Putnam.....	7th	W. A. Williams, Jr...	5	6	69	217	48	107	not separated
St. Johns.....	7th	Hiram Faver.....	26	70	142	409	113	291	23
St. Lucie.....	9th	W. R. Lott.....	47	57	104	304	75	233	18
Santa Rosa.....	1st	G. H. Leonard.....	0	17	22	67	18	52	6
Sarasota.....	12th	J. R. Peacock.....	20	15	79	806	40	278	21
Seminole.....	9th	O. P. Herndon.....	38	133	53	603	15	470	not reported
Sumter.....	5th	Roy Caruthers.....	50	100	54	252	25	204	13
Suwannee.....	3rd	J. L. McMullen.....	50	75	52	156	42	122	6
Taylor.....	3rd	James R. Jackson...	12	38	5	96	9	62	4
Union.....	8th	C. B. Hayes.....	19	23	11	62	13	49	14
Volusia.....	7th	I. Walter Hawkins...	131	119	427	1,050	92	60	not reported
Wakulla.....	2nd	G. J. Langston.....	0	10	13	46	5	25	not reported
Walton.....	1st	Miss Kate Gillis, act'g	22	37	44	152	43	114	11
Washington...	14th	Leon R. Cox.....	18	29	27	129	13	78	0
Totals.....			6,814	9,433	7,576	45,801	7,837	33,767	1,077

REPORT OF CLERK OF CIVIL COURT OF RECORD DADE COUNTY

Number of common law cases on file and undisposed of January 1, 1941	3,572
Number of common law cases filed during biennium 1941-1942.....	2,780
Number of common law cases disposed of during biennium 1941-1942	2,302

Respectfully submitted,

W. CECIL WATSON, Clerk.

REPORT OF CLERK OF CIVIL COURT OF RECORD DUVAL COUNTY

Number of common law cases filed during biennium 1941-1942.....	2,138
Number of common law cases disposed of during biennium 1941-1942	1,338

Respectfully submitted,

JOHN D. BAKER, Clerk.

REPORT OF CLERK OF COURT OF RECORD ESCAMBIA COUNTY

Number of common law cases on file and undisposed of January 1, 1941	61
Number of chancery cases on file and undisposed of January 1, 1941	171
Number of common law cases filed during biennium 1941-1942.....	199
Number of chancery cases filed during biennium 1941-1942.....	940
Number of common law cases disposed of during biennium 1941-1942	155
Number of chancery cases disposed of during biennium 1941-1942	810
Number of all other cases of special proceedings, such as adoption, free dealers, et cetera, disposed of by court order.....	14

Respectfully submitted,

MRS. GEORGE TRAWICK, Acting Clerk.

PART TWO

Opinions

1

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CHAPTER I

CONSTRUCTION OF STATUTES

DEFINITIONS

March 9, 1942.—042-121.

WAR TIME—EFFECT ON LEGAL SALES

QUESTION: Where a statute requires that a certain sale be had between some specified hour of the day, should the clerk of the circuit court use the time which has been designated by the President of the United States as War Time, or the time as defined in Section 4681, Compiled General Laws, 1927?

To Hon. J. M. Lee, Comptroller:

Section 4681, Compiled General Laws of Florida, 1927, defines legal time as follows:

"STANDARD TIME ADOPTED.—Whenever specific hours are designated in the statutes of the State, during which legal proceedings may be had, the same shall be understood to mean standard time of the central or ninetieth meridian: Provided, that in any county of the State the Circuit Court may by proper order direct that the time of the seventy-fifth meridian shall be used and in any county where such order shall have been duly entered the hours specified in the Statutes as aforesaid shall be understood to mean standard time of the seventy-fifth meridian."

The Act of Congress which establishes 'War Time,' is Public Laws 403, 77th Congress, Chapter 72, Session (S2160), and provides:

"That beginning at 2:00 o'clock ante-meridian of the 20th day after the date of the enactment of this act, the standard time of each zone established pursuant to the Act entitled 'An Act to Save Daylight and to Provide Standard Time for the United States,' approved March 19, 1918, as amended, shall be advanced one hour.

. . .

"The Standard time of each zone shall be returned to the mean astronomical time of the degree of longitude governing the standard time for each zone, as provided in such Act as of March 19, 1918, as amended."

The act referred to by Congress in the above quotation appears in USCA Title 15, Section 261, the first sentence of which reads:

"For the purpose of establishing the standard time of the United States, the territory of continental United States shall be divided into five zones in the manner provided in this section."

Therefore what Congress did was to simply advance standard time, as previously fixed by it, one hour, which now means that the standard time of the central or 90th meridian is one hour ahead of what it was prior to the Act recently passed by Congress fixing "War Time."

Therefore, Section 4681, *supra*, is still to be followed. However, standard time now means "War Time."

CHAPTER II

STATE ORGANIZATION

CONCESSIONS

May 27, 1942.—042-260.

DEED OF CESSION—EXECUTION

QUESTION: The War Department of the United States has requested a deed of cession of jurisdiction of certain lands in Orange County. The request cites Section 7, Compiled General Laws, 1927, as the authority for the Governor to grant such a deed and states that the lands involved were acquired by purchase in connection with Orlando Air Base. There was submitted with the request a form of deed of cession proposed to be executed by the Governor, in the preamble of which it is recited that the land later described "has been acquired by purchase and is now being held by the United States of America for the purpose of erecting and maintaining thereon forts, magazines, arsenals, dockyards and other needful buildings, or any of them." What is the authority of the Governor to execute such a deed?

To Hon. Spessard L. Holland, Governor:

The purposes of the acquisition as set forth in the request are not such as are recognized in the statute; nor, as you will note, as in the deed you are requested to execute.

I am of the opinion, therefore, that you are without authority to execute a deed of cession in response to the request in its present form, but that if the request is renewed and predicated upon acquisition of the land for the purposes named by the statute and in the preamble of the deed submitted for your execution, the latter would be entirely in order.

CONCESSIONS

March 25, 1941.—041-165.

MILITARY RESERVATION—JURISDICTION— SOLICITING INSURANCE

QUESTION: (1) Does the soliciting of insurance on United States military reservations under the exclusive jurisdiction of the Federal Government constitute an offense?

(2) If so, should the Insurance Commissioner call upon the County Solicitor to take action against such offenders?

To Hon. J. Edwin Larson, Insurance Commissioner:

Section 5, C. G. L., provides:

"The United States are hereby authorized and empowered to purchase, acquire, hold, own, occupy and possess such lands within the limits of this State as they shall seek to occupy and hold as sites on which to erect and maintain forts, magazines, arsenals, dockyards, and other needful buildings, or any of them, as contemplated and provided in the Constitution of the United States; such lands to be acquired either by contract with owners, or in the manner hereinafter provided." (Ch. 25, 1845, Sec. 1).

STATE ORGANIZATION—Concessions

Also, Section 7, C. G. L., provides:

"Whenever the United States shall contract for, purchase, or acquire any land within the limits of this State for the purposes aforesaid, in either of the modes above mentioned and provided, or shall hold for such purposes lands heretofore lawfully acquired or reserved therefor and shall desire to acquire constitutional jurisdiction over such lands for said purposes, it shall be lawful for the Governor of this state, upon application made to him in writing on behalf of the United States for that purpose, accompanied by the proper evidence of said reservation, purchase, contract or acquisition of record, describing the land sought to be ceded by convenient metes and bounds, thereupon, in the name and on behalf of this State to cede to the United States exclusive jurisdiction over the land so reserved, purchased or acquired and sought to be ceded; the United States to hold, use, occupy, own, possess and exercise said jurisdiction over the same for the purposes aforesaid, and none other whatsoever: Provided, always, that the consent aforesaid is hereby given and the cession aforesaid is to be granted and made as aforesaid, upon the express condition that this State shall retain a concurrent jurisdiction with the United States in and over the land or lands so to be ceded, and every portion thereof, so far that all process, civil or criminal, issuing under the authority of this State, or of any of the courts or judicial officers thereof may be executed by the proper officers thereof . . ."

And Article 1, Section 8, Clause 17, of the United States Constitution, provides that Congress shall have the power to exercise exclusive legislation over all places purchased by the consent of the Legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dockyards and other needful buildings.

The establishing of military reservations comes within the purview of the foregoing constitutional provision. (*Silas Mason Co. vs. Tax Commission of Washington*, 82 Law Edition 187, 302 U. S. 186.)

I call your attention to Chapter 10153, Acts of 1925, being Sections 6208 to 6212, C. G. L. This chapter provides certain rules and regulations for insurance companies and for violating the provisions thereof, the penalty, upon conviction, is a fine not less than one hundred dollars nor more than two hundred dollars for each offense.

Chapter 13663, Acts of 1929, Chapter 14741, Acts of 1931, and Chapter 17069, Acts of 1935, are acts regulating insurance companies but not applying to life insurance companies, sick and funeral benefit companies or their agents or solicitors, and in this respect amends Chapter 10153, supra. These chapters are now Section 6212(1) to 6212(11), C.G.L. Perm. Supp. These last mentioned chapters provide that any person violating any of the provisions thereof relating to licensing of agents and solicitors, for which the revocation or suspension of license is the only penalty provided, shall be deemed guilty of a misdemeanor and, therefore, would be subject to the punishment as provided in Section 7104, C. G. L., which provides for the punishment of all misdemeanors, when not otherwise provided by statute, to be a fine not exceeding two hundred dollars or imprisonment not exceeding 90 days or both at the discretion of the court.

Congress has enacted what is commonly referred to as the assimilative crime statute. This statute was first enacted in 1825 and has been re-enacted at subsequent intervals; the last re-enactment being June 6, 1940. The assimilative crime statute now provides:

"Whoever, within the territorial limits of any State, organized Territory, or district, but within or upon any of the places now existing

STATE ORGANIZATION—Concessions

or hereafter reserved or acquired, described in Section 451 of this title, shall do or omit the doing of any act or thing which is not made penal by any laws of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or district in which such place is situated, by the laws thereof in force on February 1, 1940, and remaining in force at the time of the doing or omitting the doing of such act or thing, would be penal, shall be deemed guilty of a like offense and be subject to a like punishment."

The effect of this re-enactment was to incorporate the criminal laws of the State of Florida, in force and effect as of February 1, 1940, into the statute and make such criminal laws, to the extent of such incorporation, laws of the United States and applicable to the United States military reservations within the State of Florida. (Franklin vs. United States, 216 U. S. 559; 54 Law Edition 615; United States vs. Press Publishing Co., 219 U. S. 1; 55 Law Edition 65.)

Title 18, Section 451, U. S. Code Annotated, provides for the exclusive jurisdiction of the federal courts over crimes committed within or on any lands under the exclusive jurisdiction of the federal government. A misdemeanor comes within the class of crimes.

I call your attention to Section 7454, C. G. L., which provides:

"Any person violating any of the provisions of Sections 6208-6212, relating to licensing of insurance agents, shall, upon conviction, be fined not less than one hundred dollars nor more than two hundred dollars for each offense," and also to Section 7454(1), C. G. L. Perm. Supp., which provides:

"Any person violating any of the provisions of sections 6212(2)-6212(11), relating to licensing insurance agents and solicitors, for which the revocation or suspension of license is the only penalty provided, shall be deemed guilty of a misdemeanor."

(1) The soliciting of insurance on United States military reservations where the reservation is under the exclusive jurisdiction of the federal government, constitutes a crime against the laws of the United States and such offender is subject to punishment either as provided by 7454 or 7454(1), supra.

(2) You should not call upon the county solicitor to take action against such offenders, for the reason that the courts of this State are without jurisdiction to try such offenses. The jurisdiction to try such offenses is exclusively within the federal district court and, therefore, you should call upon the United States District Attorney to take action against such offenses.

CHAPTER III

EXECUTIVE DEPARTMENT

ATTORNEY GENERAL

May 28, 1942.—042-262.

APPROPRIATION—INCIDENTAL EXPENSES

QUESTION: The appropriation provided by Chapter 14641, Acts of 1931 in the amount of \$1,080.59, was made for the use and benefit of the Attorney General's office and, among other things, the payment of incidental expenses of said office. The appropriation has not been used. Is it still available for the payment of incidental expenses of the Attorney General's office?

To Hon. J. M. Lee, Comptroller:

It is my opinion that the provisions of this Act are still effective and the appropriation is available for the use of my office until expended.

I refer you to an opinion rendered by the late Judge Landis while serving as Attorney General, which reads as follows:

"I am in receipt of your letter of this date making inquiry whether the unexpended balance of \$3,994.59, under the provisions of Chapter 11369, Laws of Florida, Acts of 1925, may be carried forward for use at this time, and I note your further reference to certain sections of the General Appropriation Act of 1931, Chapter 15719.

"In reply I beg to say that Chapter 11369 of 1929, is a separate Act from the General Appropriation Act, and does not appear to be limited to any particular period of time. I do not find any subsequent Act that appears to repeal or restrict said Chapter 11369, and it is my opinion that the above mentioned unexpended balance may be carried forward for use at this time or any future time."

The above referred to opinion, the conclusion of which I concur in, concerns a similar Act to Chapter 14641; and I wish to advise you further that it is my opinion that the appropriation as provided by Chapter 14641 may be carried forward for use at this time or any future time.

STATE COMPTROLLER

August 9, 1941.—041-442.

LICENSE FEES—REFUND

QUESTION: Is the State Comptroller authorized to issue warrant to refund certain moneys illegally exacted in payment of a license fee, such moneys being illegally exacted by the Conservation Department by a misconstruction of Chapter 19611, Acts of 1939?

To Hon. J. M. Lee, Comptroller:

It is my opinion that you are not authorized to refund these moneys so collected. My reason for so ruling is because Section 4, Article IX, of the Constitution of the State of Florida, provides:

EXECUTIVE DEPARTMENT—State Comptroller

"No money shall be drawn from the treasury except in pursuance of appropriations made by law."

For further authority, see 93 A. L. R. 574, 26 R. C. L. 472.

It may be well to call your attention to the fact that, if these moneys were still in the possession and under the control of the Conservation Department and were paid by the licensee to avoid proceedings of a criminal nature, the same could be refunded by the Conservation Department. (See *St. Johns Electric Company vs. City of St. Augustine*, 88 So. 387.)

STATE TREASURER

January 16, 1941.—041-4.

ASSISTANT TREASURER—AUTHORITY

QUESTION: (1) Has the Treasurer of the State of Florida authority to authorize the signing of checks on accounts in the banks by an identified person acting in the capacity of Assistant Treasurer?

(2) What is the force and effect of a stamp impression of an original signature of the State Treasurer being used in lieu of the signature?

(3) What is the general authority of an Assistant Treasurer?

To Hon. J. Edwin Larson, State Treasurer:

(1) As to the right to authorize the signing of checks by the Assistant Treasurer, it is my opinion that such a signing would not be valid under the laws and Constitution of this State. There is no provision in the laws or Constitution for an Assistant Treasurer although you do have the power to appoint a deputy or an assistant to perform ministerial duties in your office. The question is then whether the Assistant Treasurer is performing a ministerial or an official function in drawing on State accounts. In my opinion this function would be held an official one under the decisions of the Florida Supreme Court.

In the case of *Dade County vs. State*, 95 Fla. 465, 116 So. 72, the Legislature enacted a law providing for a Commission in Dade County which had under this law the authority to draw checks on county funds among other powers. The Supreme Court held that these functions were such functions:

"That the Constitution contemplates shall be performed only by duly elected or appointed and commissioned officers . . ."
The Court interpreted Section 27, Article III of the State Constitution as meaning:

"That when not otherwise provided in the Constitution the executive and administrative governmental functions of the State and counties shall be performed by officers who shall be elected by the people or appointed by the Governor, and that the duties and compensation of such officers shall be fixed by law."

The Court further said in the opinion:

"An employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature; and this constitutes perhaps the most decisive difference between an employment and an office, and between an employe and an officer. *State ex rel. Holloway vs. Sheats*, 78 Fla. 583, 83 So. 508.

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"All persons by authority of law instructed with the receipt of public money, or through whose hands such money may pass to the treasury, are 'public officers,' whether the service be general or special, transient, or permanent. State ex rel. Swearingen vs. Jones, 79 Fla. 56, 84 So. 84."

Because of this and similar decisions in Florida and other states, I believe that an Assistant Treasurer who is an employee and not a public officer elected by the people or appointed by the Governor cannot legally sign checks in his own name in drawing on public accounts in the banks.

(2) As to the force and effect of a stamp impression of an original signature being used in lieu of the signature, it is my opinion that such a stamp impression constitutes a valid signature if adopted or authorized by you and affixed by a duly authorized person, except in cases where the law clearly requires or contemplates a personal manual signature on your part. A summary of the rule regarding the validity of a stamped signature may be found in 58 Corpus Juris, Signatures, Section 17. See also annotations in 7 A. L. R. 672, 46 A. L. R. 1498 and 95 A. L. R. 768.

(3) As to the general authority of an Assistant Treasurer. As brought out in my opinion regarding the first question, Section 27, Article III of the State Constitution provides that the executive and administrative governmental functions of the State shall be performed by officers elected by the people or appointed by the Governor whose duties and compensation shall be fixed by law. There is no provision in the Constitution or statutes specifically authorizing the appointment of an Assistant Treasurer and prescribing his duties, with the exception of Section 6231, Compiled General Laws, which relates to deputies and assistants to carry out the provisions relating to proceedings against insolvent and defaulting insurance companies. Even these, however, could not perform official duties because they are not elected by the people or appointed by the Governor as required by the Constitution. Nevertheless, you do have the authority to appoint an Assistant Treasurer or such other deputies or assistants to carry out the ministerial duties of your office. Just when a duty is ministerial and hence can be performed by deputies or assistants, and when a duty is an official one constituting executive and administrative governmental function of the State, and so can be performed only by a public officer elected by the people or appointed by the Governor, is often a difficult question and must be decided as each case arises.

A general discussion of the rules in delegating power to deputies and assistants may be found in 46 Corpus Juris, Officers, Section 384 and 59 Corpus Juris, States, Section 125. Among the Florida cases discussing the distinction between a ministerial and an official act are: Willingham vs. State, 21 Fla. 761; McSween vs. State Livestock Sanitary Board, 97 Fla. 749, 122 So. 239, 125 So. 704; and Dade County vs. State, 95 Fla. 465, 116 So. 72.

STATE TREASURER

May 20, 1941.—041-274.

COURT REGISTRY DRAFTS—EXECUTED BY DEPUTY CLERKS

QUESTION: May the State Treasurer accept Court Registry Drafts drawn against Court Registry Funds deposited with his office under Chapter 15996, Acts of 1933, when the drafts are signed by Deputy

EXECUTIVE DEPARTMENT—State Treasurer

Clerks of the Circuit Court, County Court, County Judge's Court, Civil Court of Record, Criminal Court and Court of Record?

To Hon. J. Edwin Larson, State Treasurer:

It is my opinion that you are authorized to accept a draft signed by the Deputy Clerk of the Circuit Court upon the registry funds deposited by said Court for the reason that Section 4851, C. G. L., authorizes the Clerk of the Circuit Court to appoint a deputy and that the deputy, for whose acts the clerk shall be responsible, shall have and exercise the same powers as the clerk.

It is my opinion that as to the Deputy Clerks of the other Courts, you are not so authorized to accept any such draft for the reason that there is no provision in law for the appointment of such Deputy Clerks, nor is there any provision in law as to the powers that such deputies may exercise.

STATE TREASURER

May 30, 1942.—042-270.

COURT REGISTRY DRAFTS—EXECUTED BY DEPUTY CLERKS

QUESTION: Is the State Treasurer required to pay drafts drawn against court registry funds deposited with the State Treasurer under Chapter 15996, Acts of 1933, when the drafts are signed by Deputy Clerks of courts other than the Circuit Courts?

To Hon. J. Edwin Larson, State Treasurer:

This office rendered an opinion on this question under date of May 20, 1941, in which opinion I stated that under the provisions of Chapter 15996, Acts of 1933, a deputy clerk of the circuit court was empowered to perform the same duties as the clerk. I adhere to the former opinion; however, if the drafts are signed by a deputy clerk other than a deputy clerk of the circuit court, the State Treasurer is authorized to pay them, provided the clerk of the said court has designated the party a deputy and authorized the said deputy to sign these checks, and has so notified the State Treasurer that the deputy is authorized to sign as such, and further provided the State Treasurer has on record such authorization.

STATE TREASURER

January 20, 1942.—042-32.

DEPOSITS—SECURITIES ACCEPTABLE

QUESTION: (1) Should deposits made by textbook publishing companies under Section 715, Chapter 19355, Acts of 1939, be accepted by the State Treasurer as fulfilling the requirements of said statute if the deposits are in any form other than cash or certified checks?

(2) Should such certified checks bear Florida Documentary Stamps? In this connection, some companies making these deposits have insisted on acceptance of cashier's checks, and others have insisted on acceptance of certified checks without the documentary stamp tax.

To Hon. J. Edwin Larson, State Treasurer:

(1) Section 715, supra., provides that:

"The State Board shall require each publisher who submits a bid or proposal for furnishing any book or books under the provisions of

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this Chapter to deposit with the State Treasurer such sum of money or *certified checks* as may be determined by the State Board, the amount to be not less than Five Hundred Dollars (\$500.00) and not more than Two Thousand Five Hundred Dollars (\$2,500.00), according to the number of books or series of books covered by the proposal, which deposit shall be forfeited to the State of Florida for the benefit of the State Textbook Fund if the bidder making the deposit shall fail or refuse to execute such contract and bond within thirty days from date of acceptance in case his bid or proposal is accepted."

There is a difference between a certified check and a cashier's check. On a cashier's check the issuing bank alone is liable, whereas, with reference to a certified check, the certifying bank and the maker of the check are both liable thereon. The acceptance, therefore, of a cashier's check in lieu of the certified check would be the acceptance of less security than that required by the statute.

It is therefore my opinion that Section 715, *supra*, is very clear and definite in its requirements, and that its provisions should be complied with strictly, and that all deposits thereunder should be either in money or by certified check.

(2) Our statutes require documentary stamps on all written obligations to pay money delivered in the State of Florida. A certified check is a written obligation to pay money, and when it is deposited with you it meets the requirement of delivery in the State of Florida. Therefore, it is my opinion that the certified checks referred to should have attached thereto Florida documentary stamps.

STATE TREASURER

February 2, 1942.—042-53.

DUPLICATE DRAFTS—PAYMENT

QUESTION: A Clerk of the Circuit Court has advised the State Treasurer that a draft drawn on the Treasurer's office against funds deposited under Chapter 15996, Acts of 1933, has been lost. Should payment of such draft be made by duplicate or otherwise?

To Hon. J. Edwin Larson, State Treasurer:

With reference to warrants of the Comptroller that may have been lost or destroyed, Section 152, Compiled General Laws, requires that the rightful owner of such warrant shall present to the Comptroller a statement under oath reciting the number, date and amount of such warrant, or the best and most definite description in his knowledge, and the circumstances of its loss, and shall file in the office of said Comptroller a bond with securities to be approved by one of the judges of the Circuit Court, or one of the justices of the Supreme Court, in a sum of not less than twice the amount of such warrant, conditioned to indemnify the State of Florida and any innocent holder thereof from any damages that may accrue by reason of duplication thereof. Where these requirements have been complied with, the Comptroller is authorized to issue a duplicate warrant which has the same validity as the original before its loss.

The foregoing statute applies only to Comptroller's warrants, nevertheless it represents a very satisfactory method of safeguarding against damages that may accrue from duplication of such warrants, and since there appear to be no specific safeguards provided for with reference to the duplication of checks or vouchers drawn under Chapter 15996,

EXECUTIVE DEPARTMENT—State Treasurer

Acts of 1933, which funds are withdrawable upon the voucher or check signed by the judge, or one of the justices, of the court in question, and countersigned by the clerk of such court, it is my opinion that a similar safeguard should be followed in the situation you have outlined.

It is my opinion that, in following this procedure, the statement under oath should be presented to the Judge or the Clerk of the Court in question, and the bond should be approved by either such judge or clerk and conditioned to indemnify the State of Florida and any innocent holders from any damages that may accrue from duplication of the lost draft. Upon approval of such bond by the judge or clerk of the court in question, said bond should be deposited with your office.

STATE TREASURER

February 20, 1941.—041-78.

STATE FUNDS—DEPOSIT OF SECURITY

QUESTION: (1) Has the State Treasurer authority to enter into a depositary agreement with a bank, agreeing that the bank may deposit its securities, to secure the deposit of state moneys, in some depositary other than that of State Treasurer's Office?

(2) Is the State Treasurer to accept Duval County Air Base bonds as security for the deposit of state moneys?

To Hon. J. Edwin Larson, State Treasurer:

(1) It is my opinion that it was the intent of the Legislature in the enactment of Chapter 4586, Acts of 1897, Sections 173-174 and 175, C. G. L. being portions thereof, that the securities are to be deposited with the State Treasurer. It is true that there is no specific provision in the law providing where the securities are to be deposited, but I call your attention to Sec. 175, C. G. L., which evidences the intent of the Legislature providing:

"The Governor, Comptroller and Treasurer are hereby authorized to sell any or all of the bonds that may be deposited in the State Treasurer's Office as collateral security for the deposit of any state money, at public or private sale, whenever there shall be a failure or refusal on the part of the bank depositing such securities to pay any check drawn by the State Treasurer on such bank."

(2) I call your attention to Section 174 C. G. L., which provides:

"The security to be given by such banks as may be designated under the preceding sections which consist of bonds of the United States, and the bonds of the several states, county and municipal bonds, and county or county school time warrants issued by any one of the counties or cities of the State of Florida of the value thereof, as may be agreed to by the Governor, Comptroller and Treasurer."

This section was amended by Chapter 19512, Acts of 1939, said amendment providing that the bonds or other obligations issued by a housing authority pursuant to the Housing Authorities Law of this state (Chapter 17981, Acts of 1937) and any amendments thereto, or issued by any public housing authority or agency in the United States, when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the United States Government or any agency thereof, and such bonds and other obligations shall be authorized security for all public deposits. (I am not passing on the validity of this amending statute in this opinion.)

EXECUTIVE DEPARTMENT—State Treasurer

I call your attention to Chapter 19784, Special Acts of 1939, creating the special taxing district in the County of Duval and to be known as the Duval County Air Base Authority and giving the Duval County Air Base Authority the powers of a body corporate including the power to sue and to be sued. Particularly do I call your attention to Section 17 of said act which provides "any and all bonds issued under and pursuant to the Authority contained in this act, when sold, issued and delivered, shall become and be binding, *valid and legal obligations of said Authority . . .*" (Emphasis supplied). You will observe that the bonds so issued are not obligations of the county but of this Authority.

It is my opinion that the bonds of the Duval County Air Base Authority do not come within the provisions of Section 174, C. G. L. as amended by Chapter 19512, Acts of 1939.

STATE TREASURER

September 16, 1942.—042-443.

STATE FUNDS—INTEREST—DISPOSITION

QUESTION: What State fund or funds should receive interest on State moneys deposited in banks under time agreements by the State Treasurer?

To Hon. J. Edwin Larson, State Treasurer:

Prior to the effective date of Florida Statutes 1941, such interest was deposited, one-third to Permanent Building Fund, and two-thirds to General Revenue. However, the Act authorizing such disposition has been omitted from the Florida Statutes 1941.

Section 2, Chapter 20719, Acts of 1941, in adopting the revision, specifically repeals every statute of a general and permanent nature which is not included in Florida Statutes 1941, or recognized and continued in force by reference therein, such repeal being effective as of the time the Florida Statutes became effective, and the Florida Statutes became effective thirty days after June 29, 1942.

The present disposition of such interest is controlled by Section 18.15, Florida Statutes 1941, which provides that such interest shall be credited on account of General Revenue.

It is therefore my opinion that you should credit the entire interest on such deposits to the General Revenue Fund.

STATE TREASURER

June 5, 1941.—041-314.

STATE FUNDS—SECURITIES ACCEPTABLE TO INSURE

QUESTION: Are Dade County $4\frac{1}{2}\%$ Causeway Revenue Bonds acceptable as security to insure State funds?

To Hon. J. Edwin Larson, State Treasurer:

Section 174, Compiled General Laws, provides the class of securities which may be accepted to insure the safety of State funds, and in the class is mentioned "county bonds."

If these Causeway Revenue Bonds are issued by the County, such bonds are within the accepted class of securities as provided by Section 174, *supra*. I do not construe the said section to mean that the county

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bonds would have to be a general obligation of the county. In other words, the fact that the bonds are to be paid from a certain source would not defeat their eligibility as security for State funds.

STATE TREASURER

August 22, 1941.—041-470.

STATE FUNDS—SECURITIES ACCEPTABLE TO INSURE

QUESTION: (1) Are bonds issued by instrumentalities of the United States, the principal and interest being guaranteed by the United States Government, acceptable as security to secure the deposit of State moneys, as contemplated by Section 174, Compiled General Laws of Florida?

(2) Are bonds issued by political subdivisions of the various counties of the State of Florida acceptable as security to secure the deposit of State moneys, as contemplated by Section 174, Compiled General Laws of Florida?

To Hon. J. Edwin Larson, State Treasurer:

(1) My opinion is that you are not authorized to accept the bonds of instrumentalities of the Federal Government save and except the bonds or other obligations issued by a housing authority pursuant to the Housing Authorities Law of this State or issued by any public housing authority or agency in the United States, provided such housing authorities' bonds or obligations are secured by a pledge of annual contributions to be paid by the United States Government or if the principal and interest on the same are guaranteed by the United States Government.

(2) My opinion is that you are not authorized to accept bonds issued by a political subdivision of one of the several counties.

My reasons for so ruling as I have are because Section 174, Compiled General Laws of Florida, requires that the security shall consist of bonds of the United States and bonds of the several states, county and municipal bonds, and county or county school time warrants issued by any one of the counties or cities of the State of Florida. The bond, therefore, must be *issued by* and be an *obligation of* one of the aforementioned authorities. The reason for my excepting bonds and other obligations of the housing authority is because of Chapter 19512, Laws of Florida, 1939, which specifically provides that such bonds and obligations shall be acceptable security to insure the safety of State moneys. When you use the expression "political subdivision of a county," I am assuming that you do not mean a bond issued by a county payable from a particular source of revenue. A bond may be payable from a particular source of revenue and still be acceptable security, provided it is issued by and is the obligation of one of the authorities mentioned in Section 174, *supra*. (See *Torrey vs. Board of Commissioners*, 126 N. E. 673, as to county bonds.)

A different rule of law may be applicable as to acceptable securities to secure the deposit of public moneys, such as is contemplated by Section 6079, Compiled General Laws of Florida. I concluded from your request that you were only interested in the securities that are acceptable to secure the deposit of State moneys.

EXECUTIVE DEPARTMENT—State Treasurer**STATE TREASURER**

January 6, 1942.—042-10.

STATE FUNDS—SECURITIES—DUPLICATE RECEIPT

QUESTION: What requirements should be demanded by the State Treasurer of a bank that has applied for substitution and/or release of certain securities deposited with the Treasurer to insure the security of certain funds deposited by the State Treasurer in said bank when the bank has lost the official receipt issued by the Treasurer for the securities?

To Hon. J. Edwin Larson, State Treasurer:

It is my advice to you that you issue another receipt disclosing upon the face of same that it is a duplicate receipt issued in the place and stead of the receipt, giving the number and description of same, issued by you under a certain date. The receipt issued by you in such cases is not negotiable or assignable, so that, if the original receipt in this case should later turn up in the hands of some third person, the same is of no value, and you would not be authorized to recognize the same.

CHAPTER IV

JUDICIARY DEPARTMENT

CIRCUIT COURTS, CIRCUITS, JUDGES

January 15, 1942.—042-50.

JUDGES—EXPENSES—TRAVEL IN COUNTY OF RESIDENCE

QUESTION: Judge Herbert B. Frederick, Judge of the Circuit Court for the 7th Circuit, lives in Volusia County and at various times holds court at Daytona Beach, which is not the county seat of his county. In doing this he saves expenses for both the county and State as mileage for witnesses and jurors, together with the convenience for the bar of Daytona Beach. Is that legal authority for the State to pay his traveling expenses from his home to Daytona Beach while holding court there?

To Hon. J. M. Lee, Comptroller:

I wish to advise that I am of the opinion that Judge Frederick is engaged in the performance of official business under circumstances mentioned and that the following quoted part of Section 4738 authorizes the payment of the expense account submitted by Judge Frederick:

" . . . each circuit judge when traveling on official business shall be, and is hereby given an allowance to the amount of his actual expenses for transportation, board and lodging, and such amount forthwith after said official trip shall terminate, to be set forth in an itemized certificate by the circuit judge to the Comptroller: Provided, the total amount of expenses shall not exceed in any one year the sum of three hundred dollars."

This holding is expressly specified as applying to the Circuit Judge when traveling in his own Circuit. I do not intend it to apply in the case where the Circuit Judge is traveling outside of his own Circuit under a special commission from the Governor.

CIRCUIT COURTS, CIRCUITS, JUDGES

March 10, 1942.—042-126.

JUDGES—EXPENSES—TRAVEL OUTSIDE COUNTY OF RESIDENCE

QUESTION: May the State pay the expenses of Circuit Judges while traveling outside the county of their residence?

To Hon. J. M. Lee, Comptroller:

In this connection I have found the case of *State ex rel Parker versus yourself*, as Comptroller, 151 So. 491. The facts of the case are: Parker was state attorney for the Second Judicial Circuit of Florida, which is composed of several counties. Parker resides in Leon County and the expenses he sought to have paid were incurred for meals and lodging while attending the fall term of the Circuit Court in Franklin County.

The Court said:

"The general trend of legislative policy has been to provide ample means to pay the expenses of state officers and employees when traveling

JUDICIARY DEPARTMENT—Circuit Courts, Circuits, Judges

away from home on official business. In view of this general legislative policy we think the reasonable interpretation of the words 'Necessary and Regular Expense' as employed in the general appropriation bill for 1933 would be to hold that the necessary expenses of a state attorney incurred in transacting official business within his circuit but outside the county of his residence may be and are properly paid from the \$200,000 appropriated to the Judicial Department * * *

"This holding in no respect conflicts with Chapter 16184, Acts of 1933, which in effect limits the subsistence of state officers and employees to \$4.50 per day and 5 cents per mile for the use of their car when traveling within the state on official duties * * *

"The account brought in question is well within the allowance provided by Chapter 16184, Acts of 1933, and the duties performed for which the charge is claimed were well within those imposed by law on the state attorney * * *

"The test of whether or not the expense bill of a state attorney may be paid as herein decided is whether or not it was incurred in the performance of duties imposed by these or similar statutes.

"We therefore conclude that any expense incurred by state attorneys in the performance of the duties imposed upon them by law, outside the county of their residence, may be paid under Chapter 15858, Acts of 1933, so long as such expenses are within the terms of Chapter 16184, Acts of 1933."

Chapter 15858, Acts of 1933, was the appropriation act for that year. Since the state attorney is a constitutional officer and since the Supreme Court has held that Chapter 16184, Acts of 1933, fixes the expense allowance for state officers and since a circuit judge is a state officer, I therefore hold that the above case is applicable to them and I am bound thereby. Therefore, under the same, Circuit Judges are entitled to be paid subsistence and mileage as allowed by Chapter 16184, Acts of 1933, until the total amount appropriated by the Legislature for "Necessary and Regular Expense" of the Judicial Department has been exhausted.

CIRCUIT COURTS, CIRCUITS, JUDGES

June 20, 1942.—042-302.

JUDGES—EXPENSES—TRAVEL OUTSIDE COUNTY OF RESIDENCE

QUESTION: Under Chapter 16184, Acts of 1933, are Circuit Judges entitled to expenses while traveling outside the county of their residence?

To the Judges of the Circuit Courts:

Under Section 3059 R. G. S. (Section 4840 C. G. L.), I am holding that when Circuit Judges of the State are required by the Governor to perform judicial duties outside of their Circuits, they may bill the Comptroller for increased expenses occasioned and incurred in this service, provided that such bill carries the certificate of approval of the Governor.

This opinion is supplementary to that issued by me relating to the same subject matter, dated March 10, 1942 (042-126).

JUDICIARY DEPARTMENT—Circuit Courts, Circuits, Judges**CIRCUIT COURTS, CIRCUITS, JUDGES**

February 4, 1941.—041-47.

JUDGES—RETIREMENT FUND; DEDUCTIONS

QUESTION: (1) When does the salary increase made effective by the 1940 census become operative for circuit judges?

(2) How is the 2% deduction from salaries of circuit judges for their retirement fund collected?

To Hon. Harry N. Sandler, Circuit Judge, Tampa:

(1) The salary increase, accruing to you by virtue of the increase of the population of your County shown through the 1940 census, becomes effective as of April 1, 1940, and you are entitled to receive such increase of salary as of that time.

(2) The 2% deduction provided for the Circuit Judges in Section 5 of Chapter 19000, Laws of Florida, Acts of 1939, is specified in this Section to be deductible from each installment of salary. When you get the increase the 2% should be deducted from such increase. In other words, the deduction is made as the salary is received.

You will note that the Act says that the deduction shall be deducted from "each installment of salary." I do not believe that you are required to anticipate the payment of the salary increase before you actually receive it; and, therefore, you would not have to notify the Comptroller to make such deductions, except out of installment payments of your salary, that is monthly payments, and each deduction to cover the amount required by law to be deducted from each installment amount, being received.

CIRCUIT COURTS, CIRCUITS, JUDGES

May 29, 1942.—042-266.

STATE ATTORNEY FEES—COLLECTION OF SHORT ACCOUNTS

QUESTION: Has a state attorney the right to charge the Game and Fresh Water Fish Commission for the collection of money from a county judge short in his accounts?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Commission:

It is my opinion that a State attorney is not entitled to any extra compensation as a State attorney for services performed in collecting money from an official who is short in his accounts, as Chapter 15859, Laws of Florida, 1933, specifically provides what salary a State attorney shall receive, and I quote you the following:

"Section 1. That beginning July 1, 1933, the annual salaries of the several State officers and employees hereinafter mentioned shall be the amounts set opposite the title of such official or employee.

"Each State Attorney who is now entitled to receive, under the provisions of any law of the State of Florida, \$5,000.00 or more per annum, \$4,500.00.

"Each of the several State Attorneys now entitled to receive \$4,500.00 under Chapter 15720, Laws of Florida, Acts of 1931, \$3,000.00.

JUDICIARY DEPARTMENT—Circuit Courts, Circuits, Judges

"Each of the several State Attorneys now entitled to receive, under the provisions of any law of the State of Florida \$3,000.00 or more per annum, and whose salary is not otherwise provided in this Act, \$3,000.00."

The above amounts so fixed shall be the only compensation to be allowed for all services rendered by State Attorneys.

CIRCUIT COURTS, CIRCUITS, JUDGES

May 20, 1941.—041-269.

STATE ATTORNEY—SALARY

QUESTION: The Fifteenth Judicial Circuit, consisting of Palm Beach and Broward Counties, has a total population of 119,783 according to the last Federal census, and said circuit has two circuit judges. What salary should be paid to the State Attorney for said circuit, in view of the present population, and if there should be an increased salary for the State Attorney, from what period of time should an increase, if any, commence?

To Hon. J. M. Lee, Comptroller:

Chapter 10266, Laws of Florida, Acts of 1925, provided in part as follows:

" * * * in Judicial Circuits having a total population of not less than one hundred thousand people, according to the preceding State or Federal census, and having two Circuit Judges in said Judicial Circuit, the State Attorney thereof shall receive a salary of Six Thousand Dollars (\$6,000.00) per annum * * *"

Chapter 15859, Laws of Florida, Acts of 1933, provides in part as follows:

"Section 1. That beginning July 1st, 1933, the annual salaries, of the several State officers and employees hereinafter mentioned, shall be the amount set opposite the title of such officer or employee, to-wit:

* * *

"Each State Attorney who is now entitled to receive, under the provisions of any law of the State of Florida, \$6,000.00 or more per annum\$4,500.00."

These are the only provisions affecting counties having a total population of not less than one hundred thousand, and would be applicable to the Fifteenth Judicial Circuit. Further reference to this will be found in Section 4760, Compiled General Laws of Florida, Permanent Supplement. The Fifteenth Judicial Circuit apparently grew into this classification, and the salary of the State Attorney in Florida is governed by the population within his circuit. Population Acts employing census as datum for fixing salaries, are not static to a dated census, but are ambulatory. The governing census prevails for the purpose of fixing salary.

It is my opinion that Phillip D. O'Connell, State Attorney of the Fifteenth Judicial Circuit, should receive \$4,500.00 per annum, and that as the Fifteenth Judicial Circuit grew into the one hundred thousand class in population at the last Federal census, his salary, at the \$4,500.00 rate, should be from April 1, 1940, which was the date of the last Federal census.

This office delivered an opinion as to the effective date of the last census, which appears in the 1939-1940 biennial report of the Attorney General, page 531.

JUDICIARY DEPARTMENT—Clerk of the Circuit Court
CLERK OF THE CIRCUIT COURT

August 15, 1942.—042-395.

CHATTEL MORTGAGE—FILING AND RECORDING

QUESTION: (1) Under Sections 698.09-698.11, inclusive, of the Florida Statutes 1941, is there a distinction made between "filing" and "recording" so that the affidavit referred to therein must be "filed" only as distinguished from being "recorded" after being "filed"?

(2) Under Section 698.11, Florida Statutes 1941, is the Clerk of the Circuit Court supposed to maintain a place or receptacle for the "filing" of affidavits which will obviate the necessity of "recording" such affidavits, or is he supposed to "record" such affidavits for the fee of twenty-five cents, the fee mentioned in the Act?

To Hon. Paul V. Lang, Clerk Circuit Court, Leon County, Tallahassee, Florida:

Under this law it is your duty to file the instrument mentioned therein. You are not to record the same. This is in answer to question number 1.

It is your duty to maintain a "place or receptacle" where such affidavits may be filed by you.

CLERK OF THE CIRCUIT COURT

March 5, 1942.—042-106.

FEES—FLAT SUM FOR ALL SERVICES

QUESTION: Are fees for receiving and paying out registry of the court funds chargeable in addition to the flat fee allowed the clerk for civil actions in certain counties?

To Hon. Bryan Willis, State Auditor:

Acts applicable to several counties of this state provide for a flat fee as costs of court, to be charged by the clerk, in lieu of all fees formerly allowed for services performed. An example of such acts is Chapter 15920, Acts of 1933, as amended by Chapter 16869, Acts of 1935, which Acts are applicable to all counties having a population in excess of 150,000 as per the last census. These acts provide that the flat fee allowed the clerk of the court shall be "for all services to be performed by him therein, in lieu of all other fees heretofore charged, except as hereinafter provided." The only exception provided in these Acts are fees for preparing and verifying transcripts of record and for furnishing copies of records and papers.

This flat fee is not measured by the amount of services to be performed but is for all services be they few or many.

Where a gross sum is provided as the compensation of a clerk for his services in certain proceedings, he is not entitled to charge other fees for specific services involved in such proceedings (14 C. J. S. 1225, Section 9).

Therefore, the fee provided by the statute was intended to cover all services rendered in connection with a suit or proceeding, including the receiving and paying out of money paid into court as a part of the proceeding.

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JUDICIARY DEPARTMENT—Clerk of the Circuit Court
CLERK OF THE CIRCUIT COURT

March 12, 1941.—041-127.

FEES—JURORS AND WITNESSES REPORT

QUESTION: Is the clerk of the circuit court or the criminal court of record entitled to a fee for making a report as to jurors and witnesses and a fee for certifying as to each juror and witness?

To Messrs. Baker and Thornal, Attorneys for Orange County Board of County Commissioners, Orlando, Florida:

I have been unable to find any opinion that changes the ruling of the Attorney General of November 4, 1931, appearing in the 1931-32 Opinions of the Attorney General, page 484. I have carefully reviewed said opinion and the law on which it was based, and while I feel that rulings of this kind that have been in force for such a long period of time, apparently without question, should be entitled to great weight, but being unable to follow the rationale of said opinion and feeling that it is clearly in conflict with the plain language of the statute, I feel that I should overrule that portion of same that I believe to be erroneous.

Section 4867 of the Compiled General Laws of 1927, provides as to the fee of the Clerk for "Jurors, report of, to Comptroller . . . \$1.00"; fee for "Jurors, certifying as to, each . . . \$.10"; fees for "Witness, certifying as to each . . . \$.10."

This language plainly indicates to me that the Clerk of the Court was entitled to a fee of 10c for each juror certified by him; otherwise, I see no reason for providing for a fee for certifying as to each juror the sum of 10c unless the Clerk was to receive a fee of 10c for each juror, otherwise this Act would have provided for a fee of 10c for certifying to the report to the Comptroller with regard to jurors. The same is true with reference to witnesses. Rather than to provide a fee of 10c for certifying to each witness, it would have provided for a fee of 10c for certifying to each report with regard to witnesses.

I, therefore, hold that the Clerk is entitled to \$1.00 for making his report and 10c for certifying as to each witness and juror, and I overrule so much of the opinion of November 4, 1931, appearing in the 1931-32 Opinions of the Attorney General, page 484, that is in conflict with what I have said above.

CLERK OF THE CIRCUIT COURT

March 9, 1942.—042-114.

FEES—MARGINAL SATISFACTIONS

QUESTION: What fee should be charged by Clerks of the Circuit Court in connection with marginal satisfactions?

*To Hon. J. A. Fridinger, Acting Regional Attorney,
United States Department of Agriculture,
Montgomery, Alabama:*

I confirm the opinion of my predecessor in office, dated January 25, 1939, appearing in the Attorney General's Biennial Report, 1939-40, at page 27, as follows:

" * * * a fee of \$.25 is authorized under Section 4867, Compiled General Laws of Florida 1927. That provision in Section 4867 which

JUDICIARY DEPARTMENT—Clerk of the Circuit Court

makes the fee for writing any paper other than therein specifically mentioned the same as copying any record or paper would seem to apply. * * *

Further consideration of the provisions of Section 4867, Compiled General Laws of Florida, leads me to the conclusion that this statute in its provisions allowing a Clerk to make a charge of 25c for each one hundred words or less, for the writing of any paper not specifically mentioned in the statute, and also the provision of said Section allowing the Clerk to charge a fee of 25c for the fixing of the Clerk's seal to documents, are sufficient to and do warrant this 25c charge in all cases where the Clerk makes marginal cancellations of mortgages on the mortgage book records of his office.

CLERK OF THE CIRCUIT COURT

March 13, 1941.—041-135.

FEES—PAYMENT BY PRIVATE CITIZENS

QUESTION: Is the Clerk of the Circuit Court authorized to require payment of the fee named in Chapter 16869, Acts of 1935, upon institution of action to abate a nuisance in the name of a citizen, as distinguished from a public officer?

To Mr. John W. Choate, Attorney-at-Law, Miami:

Chapter 15920, Acts of 1933, as amended by Chapter 16869, Acts of 1935, now appears to be applicable to Dade County, and prescribes the fees to be charged by the Clerk of the Circuit Court of that County.

In my opinion, the Clerk would be within his rights in requiring payment of the flat fee named in said Chapter 16869 upon institution of an action to abate a nuisance in the name of a citizen, as distinguished from a public officer.

Assuming it to be a fact, as you state, that the officials named in Section 5029, Compiled General Laws of Florida, are not required to pay the prescribed fee, I must assume that such immunity is granted by the ministerial officer involved on the theory that the officials would be acting in an official capacity in the discharge of the powers and duties imposed upon them by law for the administration of which they are primarily responsible.

CLERK OF THE CIRCUIT COURT

May 8, 1942.—042-233.

FEES—"IN CONNECTION WITH THE SUIT OR PROCEEDING" CONSTRUED

QUESTION: Supplement to opinion dated March 5, 1942, (042-106) concerning clerk's fee in connection with receiving and paying out registry of the court funds.

*To Hon. John Allison, Assistant County Attorney,
305 Morgan Street, Tampa, Florida:*

Referring to the above opinion of this office, it construed Chapter 15920, Acts of 1933, as amended by Chapter 16869, Acts of 1935, and concluded as follows:

"I am, therefore, of the opinion that the fee provided by the statute was intended to cover all services rendered *in connection with a*

JUDICIARY DEPARTMENT—Clerk of the Circuit Court

suit or proceeding, including the receiving and paying out of money paid into court as a part of the proceeding." (Emphasis supplied.)

When we come to a determination of what services performed by the Clerk are *rendered in connection with the suit or proceeding*, we soon find that there is no clear line of demarcation to guide us. Many services, such as issuing process, filing pleadings, filing and recording orders and judgments, issuing executions on judgments and like services, are clearly services rendered in connection with the suit or proceeding. The bringing of money or other property into court in connection with a bill of interpleader seems clearly to be a part of the proceeding. As a usual rule the payment of money into court, pursuant to an order or decree expressly directing such payment into court, is in connection with the suit and proceeding and is a part of the proceeding.

On the other hand, if some party to the suit or proceeding, or even a third party, desires to use the registry of the court as a convenience or depository and deposits funds or property into such registry without an order of court, or without being by law required to make the deposit in the suit or proceeding, such deposit is not in connection with the suit or proceeding, or a part of the proceeding, within the purview of the statute. In the same connection, even should the parties obtain an order of the court permitting the payment into court, I do not think it should be considered as a part of the proceeding unless such requirement is customary in like suits.

CLERK OF THE CIRCUIT COURT

December 17, 1942.—042-563.

FEES—REFUNDING BONDS—VALIDATION CHARGE

QUESTION: What is the proper charge to be made by the Clerk of the Circuit Court in signing and placing his seal on validating certificates on refunding bonds of South Florida Conservancy District?

*To Hon. Raymond R. Richardson, Attorney, South Florida
Conservancy District, Belle Glade, Florida:*

Section 132.29 Florida Statutes, 1941, provides that refunding bonds shall be validated in like manner as bonds generally. Section 75.11, Florida Statutes, 1941, relating to validation certificates of bonds generally, provides as follows:

"Bonds or certificates, when issued under the provisions of this chapter, shall have stamped or written thereon, by the proper officers of such county, municipality or district issuing the same, the following: 'Validated and confirmed by decree of the circuit court (specifying the date when such decree was rendered and the court in which it was rendered),' which shall be signed by the clerk of the circuit court in which the decree was rendered, which entry shall be original evidence of said decree in any court of this state."

It is under the section quoted above that validating certificates are placed on refunding bonds.

Section 28.24 Florida Statutes, 1941 (4867 C. G. L. 1927) providing for compensation of Clerk provides for following fees which may be applicable to execution of this certificate:

"Seal, affixing to any paper other than those herein specially mentioned.....\$.25.
"Validating certificates, any authorized bond, each.....\$.20."

JUDICIARY DEPARTMENT—Clerk of the Circuit Court

Section 75.11 does not specifically provide that the Clerk shall attach his seal with his signature but in the charges allowable by Clerk in Section 28.24 the words "validating certificates" are used in authorizing charge. Such language contemplates execution by signing and placing seal thereon. The charge for attaching seal is modified by the words "paper other than those herein specially mentioned." Validating certificates are specially mentioned. It is my opinion that the fee for affixing seal is not allowable being a charge which is a constituent element of a single service (McLeod vs. Santa Rosa County, 157 So. 37) and only a fee of \$.20 each would be authorized.

CLERK OF THE CIRCUIT COURT

May 9, 1941.—041-249.

FEES—SEARCH AT REQUEST OF COUNTY OFFICER

QUESTION: May the Clerk of the Court of Record of Escambia County charge said county for searches made by him at the request of the County Attorney of said county, to determine prior cases that have been handled, disposed of, or are pending against any one defendant, and, if the Clerk is entitled to a fee for his services, what charge may he make for same?

To Hon. W. M. Wainwright, State Auditor:

Section 4867, Compiled General Laws, which fixes the schedule of fees that may be charged by the clerks of the various courts of record and of the circuit courts, is not limited in its application for services performed solely to the public in general, but, on the contrary, the clerks of the various courts may charge a fee for the services as rendered in said section, even though the services be rendered at the request or command of a county or state officer.

I am of the further opinion that for performing the services as stated the clerk is entitled to a charge of 25c for each search of one year's standing or less, and for each search of more than one year's standing he is entitled to a charge of 25c for each additional year's search or fractional year thereof.

COURT REPORTERS

August 26, 1942.—042-417.

APPOINTMENT—JUDICIAL CIRCUITS

QUESTION: May a Judicial Circuit have more than one official Court Reporter?

To Hon. Spessard L. Holland, Governor:

Section 29.01 Florida Statutes 1941, is, in part as follows:

"There shall be, whenever the presiding judge or judges shall deem it necessary in any judicial circuit in this State, an official court reporter of testimony and proceedings in trials at law in the circuits."

Section 29.04, after providing for a salary of \$1,200.00 per year for court reporters, further provides:

"However, that in all circuits composed of six counties and having two or more circuit judges and *only one official court reporter*, in which circuit there is no Criminal Court of Record in any county, the annual salary * * * shall be \$1,800.00 * * *."

JUDICIARY DEPARTMENT—Court Reporters

The language just above quoted, especially that which I have underscored, by inference, in my opinion, indicates a legislative view that the number of court reporters in any circuit is to be determined upon considerations of necessity by the circuit judges, but that if only one has been appointed in a circuit such as is described, the salary should be \$1,800.00 per year.

The foregoing is in response to your verbal request in connection with which you related the circumstances giving occasion for the inquiry.

Disclaiming any disposition or intent to influence your course or that of the circuit judges of the circuit involved—the tenth—it appears that a saving to the State of the difference between the \$1,200.00 salary of a court reporter and the regular salary of an Assistant State Attorney would be effected if an additional court reporter were appointed and would be assigned to the performance of such duties as are contemplated by law, thereby obviating the necessity of filling the vacancy now existing in the office of Assistant State Attorney of that circuit by virtue of the incumbent's absence on military leave, and would enable the State Attorney to perform the duties of his office with the desired efficiency.

P.S.—This opinion is predicated upon the Circuit Judge presiding in the Circuit, if there be such distinction recognized, or the Circuit Judges of the Circuit finding and declaring judicially that he or they deem it necessary in their Circuit that more than one, including the particular Court Reporter desired, be put in existence.

COURT REPORTERS

October 7, 1942.—042-477.

FEES—REPORTING—TRANSCRIPTION

QUESTION: (1) What compensation are official circuit court reporters entitled to when reporting and furnishing transcripts of:

- (a) Proceedings in the trial of criminal cases;
 - (b) Proceedings in preliminary hearings;
 - (c) Proceedings in the trial of civil cases;
 - (d) Argument of counsel arguing the facts to the jury in criminal cases, upon the request of the trial judge, the prosecuting attorney, or the defendant;
 - (e) Charges of the court in criminal cases, as required by section 918.10, Florida Statutes, 1941;
 - (f) Proceedings at a coroner's inquest, or preliminary hearing?
- (2) Are official circuit court reporters entitled to traveling expenses when in attendance upon hearings in places other than the official residence of the reporter?

To Hon. Bryan Willis, State Auditor:

Official circuit court reporters are appointed pursuant to Chapter 29, Florida Statutes, 1941, and are at all times subject to the call and orders of the circuit judge in the performance of their official duties, and the direction of the State Attorney. They are required by law, when called or ordered by the circuit judge, or requested by the state attorney, and in some instances when requested by the parties to the cause, to: (a) report proceedings in the trial of criminal cases; (b) report testimony in preliminary hearings; (c) report argument of counsel arguing facts to the jury in criminal cases; (d) report charges of the

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court in certain criminal cases; (e) report the proceedings in the trial of civil cases; and (f) furnish transcripts of the above proceedings (Sections 29.03, 29.04 and 918.10, Florida Statutes, 1941). The foregoing services appear to be required of official circuit court reporters, however they are not prohibited from performing services other than the above when such additional services do not conflict with their official services.

Under the provisions of section 29.03, Florida Statutes, 1941, official circuit court reporters when reporting and furnishing transcripts of testimony and proceedings in *civil cases* are entitled to a per diem of \$10.00 for each day or fraction of a day they are engaged in reporting such testimony and proceedings; but not less than \$10.00 in any one case, together with the sum of 12½¢ per hundred words for transcripts of such testimony and proceedings furnished and 6¢ per hundred words for each copy of such transcripts furnished.

The said sum of 12½¢ per hundred words for transcripts and 6¢ per hundred words for copies of such transcripts are allowed in criminal and other proceedings where transcripts and copies thereof are furnished (Section 29.03, Florida Statutes, 1941).

I do not think the last sentence in Section 29.03, Florida Statutes, 1941, is intended to provide a per diem for circuit court reporters when reporting criminal cases tried in circuit courts, because these circuit courts are not criminal courts and have been elsewhere fully dealt with in the same statute with respect to the compensation to be paid the reporter for services therein, and therefore could not be included under the term, "other courts" contained in this part of the section. I believe the salary compensation provided for these reporters under the law and their page charge for transcripts provides the compensation intended under the law for them to receive for their reporting of criminal cases tried in circuit courts. When they report criminal cases tried in other than circuit courts they would be entitled to this per diem if their reporting of same is requested by the circuit judge or state attorney of the circuit.

When we endeavor, by tracing the history of the legislation regarding official circuit court reporters, to ascertain the intention of the Legislature (Amos vs. Conkling, 99 Fla. 206, 126 So. 283, text 288) we find that prior to 1927 official court reporters were paid a per diem for reporting both civil and criminal proceedings, *but were paid no salary*, (Sections 3091 and 3092, Revised General Statutes, 1920); after the adoption of Chapter 11,976, Laws of Florida, Acts of 1927, no express provision has been made for the payment of a per diem in circuit courts, when reporting proceedings other than civil cases (Sections 29.03 and 29.04, Florida Statutes, 1941). The present law provides that the reporter shall receive a per diem "for each day or fraction of a day in which such reporter shall be engaged in reporting testimony and proceedings in *any civil case*" (Section 29.03, Florida Statutes, 1941); prior laws provided that the reporter was entitled to receive "for each day or fraction of a day in which he shall be engaged . . . in reporting testimony and proceedings" a stated per diem, no distinction being made between civil and criminal cases (Sections 3091 and 3092, Revised General Statutes, 1920). When the law was revised by Chapter 11,976, Laws of Florida, Acts of 1927, the law as revised provided that "to insure the attendance of a reporter in the circuit, such reporter shall receive a salary" in a stated sum per annum, and I believe is the salary intended in such courts to operate in lieu of a per diem in criminal trials held therein. The act providing for the court reporter of the court of record for Escambia County, Florida, also enacted in 1927, expressly provides that no per

JUDICIARY DEPARTMENT—Court Reporters

diem may be paid the reporter when reporting criminal cases, but a per diem is allowed when reporting civil cases (Chapter 11,977, Acts of 1927). These facts indicate an intent on the part of the Legislature to pay the reporter a salary in lieu of the per diem previously paid for reporting criminal and like proceedings for the state, in circuit court trials.

Under the present law when an official circuit court reporter is called upon by the parties or the judge to "report the argument of counsel arguing facts to the jury in criminal cases, he shall receive as compensation therefor not less than \$10.00 for reporting such argument" (Section 29.03, Florida Statutes, 1941). This statute seems to treat the reporting of arguments to the jury as unusual and not to be contemplated as one of the usual and fixed duties of the reporter. No mention is made in the statutes concerning the reporting of proceedings before coroners upon inquests held by them, while mention is made of reporting preliminary hearings.

From what has been said in this opinion it seems that reporters are paid a salary for reporting testimony and proceedings in criminal cases in the circuit court and not entitled to a per diem therefor except when reporting arguments to the jury. They are, however, entitled to charge for the transcripts furnished. When a reporter is called or *ordered by the circuit judge or state attorney* to perform services, such as taking a preliminary hearing, (but not a coroner's inquest) I am of the opinion that the reporter would be entitled to a per diem therefor in addition to the transcripts furnished, holding that preliminary hearings come within the language of Section 29.03 in the last line thereof, "other courts," but his per diem for coroner's hearing is limited to the amount prescribed in Section 936.16 and the reporter does not have to serve in either preliminary or coroner's hearings unless directed by his judge or state attorney.

This opinion should not be applied to court reporters of the criminal court of record (Chapters 15,997 and 16,000, Acts of 1933; Chapter 17,884, Acts of 1937; and other special laws) and of the court of record of Escambia County, Florida, (Chapter 11,977, Acts of 1927).

From the above and foregoing matters and things I am of the opinion that official circuit court reporters are entitled to receive the sum of 12½c per hundred words for all transcripts furnished, and 6c per hundred words for all copies of such transcripts furnished, together with:

(a) No per diem for reporting trials in criminal cases held in circuit courts is payable by the county;

(b) A per diem for reporting preliminary hearings, when directed by the circuit judge or state attorney, at the rate of \$10.00 per day may be charged the county. When reporting coroner's inquest, at the request of the circuit judge or the state attorney, the per diem is limited to \$5.00 per day by express provision of the statute (Section 936.16);

In cases covered by paragraph (b) above, the reporter may charge a \$10.00 per diem when he is acting at the request of interested parties and when such charge is being paid by other than the county;

(c) A per diem of \$10.00 per day or fraction of a day, but not less than \$10.00 in any one case, may be charged for reporting proceedings in civil cases, when requested by either party;

(d) A per diem of \$10.00 (even in circuit court criminal trials) per day or fraction of a day may be charged for reporting argument of counsel arguing facts to the jury in criminal cases, when requested by the circuit judge, state attorney or the defendant;

JUDICIARY DEPARTMENT—Court Reporters

(e) No per diem may be charged for reporting charges of the court in criminal cases as required by Section 918.10, Florida Statutes, 1941; the statutes do not seem to require any copies of this charge to be furnished, however, if requested they should be paid for at the rate of 6c per hundred words;

(f) A per diem of \$5.00 per day or fraction of a day may be charged for reporting proceedings at a coroner's inquest, this not being service before "a criminal or other court" and the per diem in this amount being specifically prescribed in Section 936.16 when requested by the circuit judge or state attorney. This service is not any part of the statutory duty of the circuit court reporter without authorization from the circuit judge or state attorney. If the court reporter performs this service at the request of private parties the \$10.00 per diem may be properly charged such employer therefor;

(g) A per diem may be charged a county in preliminary hearings by a circuit court reporter only when such preliminary hearings are taken by such court reporter on instructions of the state attorney or circuit judge. When they are taken at the request of anyone else the reporter may charge a \$10.00 per diem for the service, to be paid by the requester and not the county, but in these cases the reporter should have authorization from the circuit judge or state attorney to accept this employment.

Official court reporters are entitled to their "fair and reasonable traveling expenses" in addition to their other compensation, when they are called upon, by the circuit judge or state attorney, to report proceedings in places other than their official residence. These expenses must be certified by the circuit judge.

SHERIFFS

April 23, 1942.—042-199.

BAILIFFS—COURT DUTIES

QUESTION: Is a court bailiff as such, in addition to a deputy sheriff, necessary when there is no jury?

To Hon. Bryan Willis, State Auditor:

The Supreme Court in the case of *Nicholson vs. State*, 38 Fla. 99, 20 So. 818, considered the term "bailiff" as being applicable to the officer in charge of the jury during the trial and the equivalent of a deputy sheriff. The court further considered the duties of the bailiff as that of protecting the jury during their deliberations from improper communications or instructions. The sheriff alone has authority to appoint the necessary bailiff (*Owens vs. State*, 68 Fla. 154, 67 So. 39). There is no requirement that the jury be placed in charge of a person specially sworn. It is sufficient if they are put in charge of the sheriff or his deputy who have taken the oath of office (*Blackwell vs. State*, 79 Fla. 709, 86 So. 224). The sheriff is by law made the executive officer of all courts, except the county judge's court and the justice of the peace courts and joint executive officer of them.

I find nothing in the laws of this state requiring that both a bailiff and the sheriff or his deputy be in attendance upon a court when only one person is needed. The bailiff does not seem to be an officer of the court separate from that of sheriff. There seems to be no legal reason why the sheriff or one of his deputies might not act as both court officer and bailiff. If two or more officers are needed to guard the jury and keep order in court then the sheriff should furnish them.

JUDICIARY DEPARTMENT—Sheriffs

SHERIFFS

August 1, 1942.—042-374.

CONTRACTS—AGREEMENT TO FURNISH PROPERLY DEPUTIZED GUARDS FOR PRIVATE CORPORATION

QUESTION: Has the Sheriff of a Florida county the right to enter into a contract with a private corporation, which is doing war work for the Government, to furnish guards properly deputized to guard both Government and company property?

To Hon. Spessard L. Holland, Governor:

Florida Statutes, 1941, Section 30.07, states:

"Sheriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible."

Section 30.08, Florida Statutes, 1941, provides:

"The several sheriffs of this state shall file with the several clerks of the circuit court in their several counties, the names and addresses of all deputy sheriffs within ten days from their appointment."

Section 30.09, Florida Statutes, 1941, specifies the qualifications of deputies for sheriffs to be the following:

"(1) BOND, SURETIES, PERFORMANCE OF SERVICES.—Each deputy sheriff, appointed as aforesaid, shall be required to give bond in the penal sum of one thousand dollars, payable to the governor of Florida and his successors in office, with two or more good and sufficient sureties to be approved by the board of county commissioners and filed with the clerk of the circuit court, which bond shall be conditioned upon the faithful performance of the duties of his office. No deputy sheriff shall be allowed to perform any services as such deputy until he shall subscribe to the oath now prescribed for sheriffs and until the approval of his bond. The aforesaid sureties shall be liable for all fines and amercements imposed upon their principal."

There is no Constitutional inhibition in this State against a sheriff appointing one or more deputies to serve a private concern whose compensations for such services are paid by such private concern, and no statute prohibiting the same.

Our Supreme Court in the case of *State ex rel Rauscher et al vs. Gandy*, Sheriff (178 So. 166) has sustained, in its holding there made, the right of a sheriff to select his appointees under a law requiring deputies for special purposes and providing for their pay to come from a source other than the sheriff; also, in numerous decided cases by various courts of last resort over the nation, the reason and principle is sustained, that a deputy receiving his salary from some private enterprise and devoting his entire time thereto, can be appointed and legally deputized by the official. Answering your inquiry therefore in point and definitely:

There does not seem to be any question but that the sheriff has the authority to appoint deputies for private concerns with the understanding that their salaries will be paid by such users, it being of course their sole duties, as such deputies, to protect the property of the private concerns. However, in such cases it should be borne in mind that if an act is done by a deputy in the service of a private concern in the course of his employment and injury results therefrom, the private concern would be

JUDICIARY DEPARTMENT—Sheriffs

liable, as an employer, if the other essential facts making up such liability exist, for damage resulting from such injury, unless such act of the deputy was committed in the discharge or endeavor to discharge his official duties; in this latter case the sheriff might be liable for such damages, and might be liable even to the exclusion of the private concern.

SHERIFFS

December 12, 1942.—042-557.

DEPUTY SHERIFFS—APPOINTMENT OR DISMISSAL PROCEDURE

QUESTION: What is the proper procedure to be followed by Sheriff J. T. Shepherd of St. Johns County, Florida, in re-appointing and/or dismissing deputy sheriffs who hold commissions under his predecessor in office, the late Honorable E. E. Boyce, deceased?

To Hon. Murray Sams, State Attorney, DeLand, Florida:

It is my opinion that upon the death of Sheriff Boyce, the authority of the deputies serving under him ceased. Should Sheriff Shepherd desire to appoint as his deputy one or more of the deputies who served under his predecessor in office, the Sheriff should designate such persons by appointment as deputy sheriff under the authority of Section 30.07, Florida Statutes 1941, and should then file with the Clerk of the Circuit Court of St. Johns County the names and addresses of such deputy sheriffs within ten days from their appointment. Section 30.08, Florida Statutes, 1941.

If it should be that Sheriff Shepherd does not desire to appoint as his deputy one or more of those who served as deputy sheriffs under Sheriff Boyce, it will be proper for him by written communication to advise such person that his commission and appointment as deputy sheriff is no longer in effect. Such information should also be furnished to the Clerk of the Circuit Court of St. Johns County.

SHERIFFS

March 27, 1941.—041-171.

FEES—ARRESTS BY HIGHWAY PATROLMEN

QUESTION: What fees are Sheriffs entitled to when State Highway Patrolman makes an arrest?

*To Hon. W. W. Davis, Sheriff, Columbia County,
Lake City, Florida:*

Section 5 of Chapter 19551, Acts of 1939, provides in part as follows:

"In all cases where arrests are lawfully made by patrol officers as provided herein, the person arrested shall be immediately conducted by said officer to the county seat of the county and delivered to the sheriff thereof by such arresting officer or obtain from such person arrested a good and sufficient bond requiring his appearance before the proper tribunal of such county to answer the charge for which he was arrested, and all fees accruing thereafterwards shall be taxed against the party arrested which fees are hereby declared to be part of the compensation of said sheriffs, authorized to be fixed by the Legislature by virtue of Section 6, Article VIII of the Constitution and are to be paid to such sheriff in the same manner as his fees are paid to him for like services in other criminal cases. All patrol officers are hereby directed to immediately

JUDICIARY DEPARTMENT—Sheriffs

deliver all bonds accepted and approved by them to the sheriff of said county. No patrol officer shall ever be entitled to any fee or mileage cost.

"Nothing herein contained in this Section shall be construed in any wise as a limitation upon the existing powers and duties of sheriffs, police officers or other law enforcement officers. Except as specifically authorized herein, said Patrol Officers shall not otherwise perform the duties and functions of sheriffs, constables and other law enforcement officers."

Under this statute when a person arrested is delivered to the sheriff at the county seat, or when a bond accepted and approved by a State highway patrolman is delivered to the sheriff, all fees accruing thereafter—that is, all fees for services rendered by the sheriff after the moment of the delivery of the arrested person or the bond—are to be paid to the sheriff as in other criminal cases.

Section 4588, Compiled General Laws, 1927, provides for the fees to be charged by the sheriffs of the several counties. Under that Section a sheriff would not, of course, be entitled to the fee for the arrest of the prisoner, nor for writing, taking, and approving the bond in a case where the State highway patrolman obtained a bond from the person arrested. Nor would the sheriff be entitled to mileage to the point of arrest by the State highway patrolman, for Section 4592 prohibits a sheriff from charging constructive mileage.

The other items in Section 4588 seem proper to be charged by the sheriff when the services are rendered by him after the moment of the delivery to him of the arrested person or the bond. When a State highway patrolman arrests a person, one item in Section 4588, Compiled General Laws, seems at first reading to be inapplicable as a proper charge on the part of a sheriff—"Commitment to jail of prisoner arrested by him,"—but upon consideration, it is my opinion that a sheriff is entitled to charge this fee when he commits to jail a prisoner arrested by a State highway patrolman. This construction is based upon the language in Section 5 of Chapter 19551 above quoted, that all fees accruing after the delivery of the person arrested or the bond "are to be paid to such sheriffs in the same manner as his fees are paid to him for like services in other criminal cases."

SHERIFFS

October 21, 1941.—041-604.

FEES—ARRESTS BY HIGHWAY PATROLMEN

QUESTION: (1) Is the sheriff entitled to fees for arrest and for mileage to and from the place of arrest when the prisoner is delivered by a State patrolman to the sheriff at the county seat?

(2) and (3) When the prisoner is delivered to the sheriff is it necessary for a warrant to be sworn out? If it is not necessary for a warrant to be sworn out, under what process may the prisoner be held?

(4) When a bond is accepted by the State patrol officer and delivered to the sheriff, is the sheriff entitled to fee for "writing, taking and approving" the bond under Chapter 20943, Acts of 1941, or any other fee for receiving, keeping and recording the bond?

To Hon. Bryan Willis, State Auditor:

(1) Section 5 of Chapter 20451, Acts of 1941, provides in part as follows:

"In all cases where arrests are made by Patrol Officers as provided herein, the person arrested shall be immediately conducted by said

JUDICIARY DEPARTMENT—Sheriffs

officer to the county seat of the county and delivered to the sheriff thereof by such arresting officer or obtain from such person arrested a good and sufficient bond requiring his appearance before the proper tribunal of such county to answer the charge for which he was arrested, and all fees accruing thereafter shall be taxed against the party arrested, which fees are hereby declared to be part of the compensation of said sheriffs, authorized to be fixed by the Legislature by virtue of Section 6, Article VIII of the Constitution, and are to be paid to such sheriffs in the same manner as his fees are paid to him for like services in other criminal cases. All Patrol Officers are hereby directed to immediately deliver all bonds accepted and approved by them to the Sheriff of said county. No Patrol Officer shall ever be entitled to any fee or mileage cost except when responding to a witness subpoena issued in a civil cause. Nothing herein contained in this Section shall be construed in any wise as a limitation upon the existing powers and duties of sheriffs, police officers or other law enforcement officers. Except as specifically authorized herein, said Patrol Officers shall not otherwise perform the duties and functions of sheriffs, constables, or other law enforcement officers."

In an opinion dated March 27, 1941, I stated in interpreting the analogous provisions in the earlier Act creating the State Highway Patrol (Chapter 19551, Acts of 1939):

"Under this statute when a person arrested is delivered to the sheriff at the county seat, or when a bond accepted and approved by a State highway patrolman is delivered to the sheriff, all fees accruing thereafter—that is, all fees for services rendered by the sheriff after the moment of the delivery of the arrested person or the bond—are to be paid to the sheriff as in other criminal cases.

"Section 4588, Compiled General Laws, 1927, provides for the fees to be charged by the sheriffs of the several counties. Under that section a sheriff would not, of course, be entitled to the fee for the arrest of the prisoner, nor for writing, taking, and approving the bond in a case where the State highway patrolman obtained a bond from the person arrested. Nor would the sheriff be entitled to mileage to the point of arrest by the State highway patrolman, for Section 4592 prohibits a sheriff from charging constructive mileage."

(2) and (3) When a State patrol officer duly makes an arrest without a warrant, it is not necessary for a warrant to be sworn out inasmuch as the prisoner is in the custody of the law and there is no occasion for a further arrest pursuant to a warrant. The law stated in *Corpus Juris* that appears applicable to this situation:

"Although where one is arrested and brought before a magistrate without a warrant, nothing further is required to give him jurisdiction, since, being already in custody, there is no reason to issue a warrant for his apprehension, yet a written complaint or information against defendant setting out his offense is generally just as necessary in such a case as in any other." (16 C. J. Criminal Law, Section 495).

Under this rule it would seem necessary for the State Patrol Officer to make an affidavit or written complaint stating the charges against the person arrested.

It is not necessary for a warrant to be sworn out when the State Patrol Officer accepts a bond from the prisoner and delivers the bond instead of the prisoner.

(4) A sheriff is not entitled to the fee for "writing, taking and approving" bonds authorized in Chapter 20943, when a bond is delivered

JUDICIARY DEPARTMENT—Sheriffs

to him by a State Patrol Officer under Section 5 of Chapter 20451, nor do I find any statute providing a fee to be charged by a sheriff for receiving and holding a bond so delivered.

SHERIFFS

October 29, 1942.—042-510.

FEES—ARRESTS FOR TRAFFIC VIOLATIONS

QUESTION: What fees are sheriffs entitled to receive for making arrests for traffic violations in the absence of any highway patrol officers?

*To Hon. R. M. Witherspoon, County Judge,
Franklin County, Apalachicola, Florida:*

Section 5 of Chapter 20451, Laws of Florida, Acts of 1941, prescribes the powers and duties of officers of the Florida Highway Patrol.

Sub-section (c) of Section 5, provides in part as follows:

"Nothing herein contained in this section shall be construed in any wise as a limitation upon the existing powers and duties of sheriffs, police officers, or other law enforcement officers."

It is my opinion therefore, that sheriffs and their deputies are authorized to arrest persons for violations of the traffic laws and to charge the same fees therefor as they are allowed under the law for making arrests in other cases.

SHERIFFS

July 10, 1942.—042-349.

FEES—ARRESTS FOR VENEREAL DISEASE

QUESTION—May the Sheriff of Lee County charge for arresting and feeding persons infected with venereal disease?

To Hon. Fred Roberts, Sheriff, Lee County, Ft. Myers, Florida:

Section 3947, Compiled General Laws, 1927, makes it unlawful for a person afflicted with any infectious venereal disease to refuse to submit to physical examination and inspection by any representative of the State Board of Health. This Section is as follows:

"**PHYSICAL EXAMINATION OF SUSPECTED PERSONS.**—Any person suspected of being afflicted with any infectious venereal disease shall be subject to physical examination and inspection by any representative of the State Board of Health, and for failure or refusal to allow such inspection or examination, they shall be guilty of a misdemeanor and shall be punished as for a misdemeanor: Provided, the suspected person shall not be apprehended, inspected or examined against his will, except upon the sworn testimony of the person or persons accusing; and upon the presentation of the warrant duly authorized by the justice of the peace, or some court officer charged with the execution of this law. (Id. §4.)"

The Sheriff is not authorized under the law to arrest and take into custody any person solely because he or she may be infected with a venereal disease, unless and until a proper complaint has been made and a warrant of arrest issued and delivered to such Sheriff for service. After warrant has been properly issued and delivered to the Sheriff, he then, of course, has authority to arrest the person charged in such

JUDICIARY DEPARTMENT—Sheriffs

warrant and to charge therefor the statutory fees. The arrested person is then his prisoner and the Sheriff is authorized under the law to provide food and other necessary care for such prisoner and to charge the lawful fees therefor.

SHERIFFS

May 22, 1942.—042-248.

FEES—COPIES OF PROCESS USED IN MAKING SERVICE

QUESTION: What are the proper charges to be made by sheriffs for copies of process used in making service of such process?

To State Armory Board, St. Augustine, Florida:

Section 1 of Chapter 20,943, Laws of Florida, Acts 1941, provides, in part, that the fees to be charged by the sheriff shall be, for,

"Copies of process, 100 words or less	\$0.25
Every subsequent 100 words	\$0.10."

Other charges are provided for the actual service of process.

Statutes providing a fee to the sheriff for copies of process were intended to compensate him for the time and expense required to be expended in making or causing the copies to be made and for verifying them with the original. The sheriff is responsible for the accuracy of the copy served and must verify it with the original before he can safely serve it. This copy may be obtained by the sheriff making it or having it made or by someone making and furnishing it. Even where someone makes and furnishes copies to the sheriff without charge he is only saved the expense and time required for making them but still must verify them by comparison.

I am, therefore, upon further consideration, of the opinion that the sheriff may, in the absence of a special agreement as to what portion of the charges should be deducted as representing the time or expense saved the sheriff in making of the copies, charge the statutory fee allowed by law for copies of process even when such copies are made and furnished him free of charge.

SHERIFFS

September 13, 1941.—041-544.

FEES—COUNTY TRAFFIC OFFICERS IN NON-TRAFFIC CASES; APPROVING BONDS

QUESTION: (1) Are fees in non-traffic violations properly chargeable on account of arrests and mileage of county traffic officers commissioned under the provisions of Chapter 18396, Acts of 1937, when the arrests in question were made by such officers in their capacity as deputy sheriffs for offenses other than traffic violations, such arrests in great majority being without warrant and arising from emergency calls?

(2) Is the Sheriff's office entitled to the statutory fee on account of the attendance of such traffic officers in non-traffic cases in Justice of the Peace Courts?

(3) If a defendant under Sections 59, 60 and 61 of the Criminal Code (Chapter 19554, Acts of 1939) who has been admitted to bail, has deposited bond and later deposited a substitute bond, is the sheriff's office entitled to the statutory fee for approving the substitute bond as well as the original bond?

JUDICIARY DEPARTMENT—Sheriffs

To Hon. Bryan Willis, State Auditor:

(1) In my opinion, fees for the arrest and mileage in these non-traffic violations are properly chargeable under Chapter 18396 under the circumstances you describe since the traffic officers in question are acting in their capacity as deputy sheriffs. This construction is consistent with the opinion of the Attorney General dated October 22, 1936, and reported in the Biennial Report, 1935-1936, page 274.

(2) In my opinion, such charges are proper.

(3) In my opinion, the sheriff's office is entitled to the fee for writing, taking and approving each of these bonds.

SHERIFFS

April 21, 1941.—041-208.

FEES—DELIVERING PRISONER TO STOCKADE

QUESTION: May a Sheriff charge a fee for delivering a prisoner to the County Stockade?

*To Mr. James H. Millican, Jr., Attorney, Board of Bond Trustees,
Putnam County, Palatka, Florida:*

No official is entitled to compensation for any service unless specifically provided by law.

I know of no statute providing for such fee, but I am of the opinion that the Sheriff would be entitled to 12½c per mile for his travel between the county jail and the stockade and return, plus 12½c for transportation of the prisoner.

I do not understand how or upon what authority any fees could be charged back against the sheriff. As a matter of fact, it is my opinion that the sheriff has the right to waive all fees and the auditing authorities are properly concerned only with the legality of his claims for compensation.

SHERIFFS

April 2, 1942.—042-152.

FEES—FINGERPRINTING PRISONERS

QUESTION: If a man is arrested for being drunk this week and fingerprinted, should he not be fingerprinted for a like charge if arrested the next day, or the next week? If he is re-committed to jail from Court should he then be fingerprinted again? Should a complete record be kept of all prisoners, showing how many times each one had been drunk, been fighting, or any other crimes they may be charged with?

To Hon. John Scott, Sheriff, Bay County, Panama City, Florida:

The Florida Supreme Court in *Martin vs. State*, 129 So. 112, 100 Fla. 16, recognized the use and value of fingerprints as evidence, and therein stated:

"Experience of recent years has shown that one of the most effective means of identifying and apprehending burglars, robbers and thieves is through bureaus of identification by using the photograph and fingerprint."

A sheriff's compensation, being governed entirely by statute, "may be regulated as to the amount, time and manner of payment as the

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Legislature sees fit to direct," *Sweat, Sheriff vs. Waldron*, 167 So. 363, 123 Fla. 478.

Until 1941 there was no Florida statutory authority for a fee for sheriffs for taking fingerprints. Section 1 of Chapter 20943, Laws of Florida, Acts of 1941, re fees to be charged by sheriffs, provides in part as follows:

"Fingerprinting; for each prisoner, \$1.00."

While the Florida Legislature has not determined in what cases fingerprints shall be taken, reference to fingerprints in Section 145 of the Criminal Procedure Act of 1939, as well as the authorization for the payment of a fee therefor as above quoted, clearly indicates that the Legislature contemplated the taking of fingerprints by sheriffs as conservators of the peace for identification purposes in at least criminal proceedings. Your inquiry necessarily calls for a construction of that part of Section 1, Chapter 20943, Acts of 1941, as to when payment is required to be made for the taking of fingerprints.

The Legislature of Florida, by Senate Bill 448, appearing in the 1929 General Laws as Chapter 16349, attempted to create a bureau of criminal identification. This bill was never constitutionally enacted for the reason that it was never passed by the House of Representatives. However, Section 7 thereof, which related to the duty of sheriffs of the counties, may serve as a helpful yard stick or guide in the determination of the question in hand. The same sought to provide for the furnishing of fingerprints "of all persons arrested by them, charged with a felony and such other persons arrested by them who are suspected of being suspicious characters, persons with former criminal records, fugitives from justice and persons wanted for or charged with serious crimes."

While not the law, this expression of one House of the Legislature, as appears upon its journals, seems to be reasonably comprehensive and designates persons whose fingerprints should be taken.

There being no statute which directs or makes it the mandatory duty of a sheriff to take fingerprints, it is my opinion that a certain amount of discretion is necessarily lodged in the sheriff in determining the necessity for taking fingerprints of a prisoner for future identification purposes.

Whether such discretion is abused undoubtedly will be considered by the board of county commissioners, as they are by statute authorized to do, in approving your fee bills for payment.

I do not believe the county commissioners will or should arbitrarily refuse payment where it appears that a felony has been committed or where fingerprints are reasonably necessary for the identification of the person arrested as a suspicious character, a fugitive from justice or wanted for a serious crime.

I suggest that you meet with the board of county commissioners and come to some understanding as to when fingerprints are reasonably necessary for identification purposes.

It is my further opinion that the sheriff should keep a complete record of all arrests made by the office and that the same should include the fingerprints if the same are reasonably necessary for identification purposes.

JUDICIARY DEPARTMENT—Sheriffs**SHERIFFS**

October 18, 1941.—041-600.

FEES—GUARDING SCHOOLHOUSE

QUESTION: Is a sheriff entitled to fees or reimbursement of expenses in guarding a schoolhouse in his county by special request?

To Hon. Bryan Willis, State Auditor:

Section 2 of Chapter 20643, Acts of 1941, which Chapter is expressly applicable only in Liberty County, provides as follows:

"That the Sheriff of Liberty County, Florida, shall receive the sum of Six Thousand (\$6,000.00) Dollars per annum, payable in twelve monthly installments of Five Hundred (\$500.00) Dollars each to be paid by warrants drawn by the Board of County Commissioners of Liberty County, Florida, upon the Fine and Forfeiture Fund of such County for his services as Sheriff of said County, which said sum shall be in lieu of any and all other fees except for feeding prisoners and except for making trips outside of the State of Florida; that he shall receive in addition to the above mentioned compensation the fees for feeding prisoners as is provided for by general law and that in addition thereto he shall be paid for bringing prisoners back to Liberty County from any point outside of the State of Florida as is provided for by the general law.

"All fees assessed by the Sheriff in all cases, except civil cases, when collected, shall be remitted to the Fine and Forfeiture Fund of such county."

Under the provisions quoted the Sheriff of Liberty County is not entitled to fees or reimbursement for his services in guarding the schoolhouse. In rendering this opinion of course I do not pass on the constitutionality of Chapter 20643.

SHERIFFS

July 22, 1942.—042-367.

FEES—ILLEGAL ARREST—MILEAGE AND JAIL FEES

QUESTION: Should arresting officers be allowed mileage and jail fees when they do not follow the law?

To Hon. Gunter Stephenson, County Solicitor, Bartow, Florida:

Mr. J. R. Clements, Justice of the Peace in the Lakeland District, has requested an opinion as to whether or not arresting officers should be allowed mileage and jail fees when they do not follow the law.

My opinion concerning such query is that arresting officers should not be allowed mileage and jail fees when they do not follow the law. While the correspondence from Mr. Clements is not clear, it is apparent that he is of the belief that arresting officers serving a warrant issued by the County Judge of Polk County should return the accused to the most accessible magistrate in the county in which the arrest occurs instead of taking the accused before the magistrate who issued the warrant. In such cases, it is my opinion that arresting officers serving a warrant issued by the County Judge of Polk County should take the accused before the magistrate who issued the warrant and in such case arresting officers are entitled to mileage and jail fees.

In making arrests without a warrant, the officer making the arrest shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs.

JUDICIARY DEPARTMENT—Sheriffs

I am of the further opinion that the proper medium of settlement of this matter is by the County Commissioners of Polk County.

SHERIFFS

April 23, 1942.—042-225.

FEES—MILEAGE—INVESTIGATION OF CRIMES

QUESTION: Are sheriffs entitled to payment of a mileage fee for the investigation of crimes?

To Hon. Alfred T. Airth, State Attorney, Live Oak, Florida:

Chapter 20943, Acts of 1941, provides as follows:

"Investigation of crimes when made under the direction of the State's Attorney, County Solicitor or other prosecuting officer, per day per deputy (to be approved by the court)\$6.00"

When a State Attorney, County Solicitor or other prosecuting officer, in his discretion, requests the sheriff to make an investigation of any crime, a sheriff is entitled to receive a fee of six dollars per diem for services so rendered by himself and/or each deputy sheriff who actually participates in the investigation, on the finding and the entry of an order by the trial court that such service was reasonably necessary for the prosecution of the crime charged and approving the charge for such service.

While Chapter 20943 makes specific provision for the payment of mileage fees to sheriffs for certain services, no provision is made for the payment of a mileage fee for the investigation of crimes.

In *Sweat, Sheriff vs. Waldon*, 123 Fla. 478, 167 So. 363, the Supreme Court of Florida, in passing upon a question of fees to be paid the sheriff, stated as follows:

" * * * At the early common law, he was required to perform his duty gratuitously, but under later English statutes, and under the law generally, he is now allowed compensation; but that being in derogation of the common law, statutes authorizing it should be strictly construed. Being a creature of the statute, a sheriff's compensation may be regulated as to amount, time, and manner of payment as the Legislature sees fit to direct."

Prior to the enactment of Chapter 20943, Acts of 1941, no fees were authorized to be paid a sheriff for the investigation of crimes. If the Legislature had intended the payment of a mileage fee in connection therewith, it would have made specific provision therefor in addition to the provision for the per diem fee.

On the authority of *Sweat, Sheriff vs. Waldon*, supra, that statutes authorizing payment of sheriff's fees should be strictly construed, it is my opinion that a sheriff is not entitled to a mileage fee for making investigation of a crime.

SHERIFFS

June 27, 1941.—041-349.

FEES—MILEAGE—REMOVAL OF PRISONERS TO JAIL

QUESTION: What mileage may a sheriff charge in event he sends more than one deputy for the return of two or more prisoners from a point within the territorial limits of the State?

JUDICIARY DEPARTMENT—Sheriffs

To Hon. W. M. Wainwright, State Auditor:

A sheriff is only entitled to the compensation and reimbursement for expenses as is provided by law. Section 4588, Compiled General Laws, provides for the fees to be charged by the sheriffs and for "removal of prisoner to or from jail, per mile, each way, 12½c."

The sheriff, therefore, is only entitled to charge 12½c for each mile traveled per car. The fact that the sheriff may send two or more deputies has no bearing on your question, the determining factor being whether or not it is *necessary* that he send more than one car for the return of the prisoners. If the sheriff should send two deputies in two cars to the same point of destination to return two prisoners, it would appear that such an act on his part might be open to investigation. It would be in violation of the spirit and purpose of the statute to hold that the sheriff had uncontrollable discretion as to the number of deputies and cars he could send for the return of prisoners. I refer you to the ruling of our Supreme Court in the case of *State Ex Rel Attorney General vs. Johnson*, 35 Fla. 539, 17 So. 650, as to the exercise of discretion by sheriffs. Therefore, if it is necessary that the sheriff send, for example, two cars for the return of prisoners, he is entitled to 12½c per mile each way per car.

SHERIFFS

February 8, 1941.—041-44.

FEES—NO CORONER'S INQUEST

QUESTION: Is a sheriff entitled to charge fees or mileage in cases where he finds dead bodies and supervises preliminaries for determining necessity for inquest?

To Hon. J. E. Albritton, Sheriff of DeSoto County, Arcadia, Florida:

No compensation or cost charges can be allowed where a coroner's inquest is not held.

Article VIII, Section 6 of our Constitution expressly provides that a sheriff's "powers, duties and compensation shall be prescribed by law," making such powers, duties and compensation "dependent upon legislative action." *Lange vs. Walker*, 46 Fla. 248, 35 So. 78.

The Supreme Court of Florida has held that laws allowing compensation to a sheriff were in derogation of the common law and statutes authorizing same should be strictly construed. *Sweat vs. Waldon*, 123 Fla. 478, 167 So. 363.

I have found no statute that would allow the sheriff of DeSoto County to receive mileage or compensation in cases where no coroner's inquest is actually held.

Section 4588 Compiled General Laws of 1927, allows a fee of \$4.00 to be charged for "attendance on all courts, for each court per day," and \$5.00 for "coroner's inquest, attending" as well as 12½c for "mileage per mile each way."

SHERIFFS

May 28, 1942.—042-265.

FEES—PRISONER TRANSFERRED BY HIGHWAY PATROL

QUESTION: What fees are payable to the Sheriff for prisoners turned over to him by the Florida Highway Patrol?

JUDICIARY DEPARTMENT—Sheriffs

To Hon. M. P. Luten, Sheriff, Gadsden County, Quincy, Florida:

Under Section 5, Chapter 20451, Laws of Florida, Acts of 1941, only such fees as accrue after the prisoner is turned over to the sheriff, by the road patrol, are payable to the sheriff. The arrest is made by the patrolman and not by the sheriff, therefore, the sheriff may make no charge for the arrest. Under Chapter 20943, Laws of Florida, Acts of 1941, the sheriff would be entitled to receive one dollar for the commitment of the prisoner, unless he made bond after being turned over to the sheriff in which case the sheriff would be entitled to charge the prisoner two dollars for writing, taking and approving the bond. If the prisoner is committed the sheriff will be entitled to receive an additional fifty cents for releasing him; however, if he is fined and the sheriff collects the fine he will be entitled to receive five per cent of the money "collected for the state as fines, fees, costs or other moneys adjudged to the state." The commission for collecting fines, fees, etc., should be paid by the county and should never be taxed as additional charges against the prisoner. In order to properly keep the accounts of the county the entire amount of fines, fees and costs should be paid into the fine and forfeiture fund and the county should be billed by the sheriff for his commission.

SHERIFFS

March 5, 1942.—042-105.

FEES—REPORT OF ARREST

QUESTION: Section 277 of the Criminal Procedure Act provides that it shall be the duty of the sheriff when an arrest is made, other than on a *capias*, to transmit to the prosecuting attorney of the trial court having jurisdiction a report thereof in the form prescribed by said section. Is there any fee provided for the sheriff in making this report?

To Hon. Bryan Willis, State Auditor:

No provision is made in the Criminal Procedure Act for the payment of any fee for the making of the above report and there does not seem to be any other provision of the statute providing for a fee for such services. The report does not seem to be a "process" within the usual meaning of process (50 C. J. 441; 34 Words and Phrases 145; 37 Words and Phrases 22). The statutes contain numerous instances where reports are required of county officers for which no fee is provided.

Public officials have no legal claim for official services rendered, except when, and to the extent that, compensation is provided by law, and when no compensation is so provided, the rendition of such services is deemed to be gratuitous (State vs. Reardon, 114 Fla. 755, 154 So. 868); the sheriff may have from the county only such compensation and reimbursements as are allowed by statute (Brown vs. St. Lucie County, 114 Fla. 789, 153 So. 906.)

No compensation being provided in the statute for the services required in making the report, in my opinion no compensation should be allowed.

SHERIFFS

September 17, 1942.—042-451.

FEES—SEIZURE OF ILLICIT BEVERAGES AND APPARATUS

QUESTION: What fees, if any, are sheriffs entitled to for seizing, transporting, holding and destroying illicit alcoholic beverages or apparatus used in connection therewith?

JUDICIARY DEPARTMENT—Sheriffs

To Hon. Bryan Willis, State Auditor:

The provisions for sheriff's fees in section 7627 (5483), Compiled General Laws, 1927, have been superseded or repealed. Proceedings for the forfeiture of illicit alcoholic beverages and apparatus are now had under Sections 562.38, 562.39, 562.40, 562.42 and 562.43, Florida Statutes, 1941.

The following schedule of fees (provided in Section 1, Chapter 20, 943, Laws of Florida, Acts of 1941) seem applicable and proper to be allowed sheriffs in cases involving the seizure and forfeiture of illicit alcoholic beverages and apparatus used in connection therewith, to-wit:

Where the seizure and forfeiture is made pursuant to a proceeding in court:

Seizing and safekeeping of the illicit alcoholic beverages or apparatus, the actual and necessary expense incurred in connection therewith, the bill for the same to be approved by the judge under whose jurisdiction the proceeding shall come.

Execution of any process issued by the court in connection with the cause\$2.00

Mileage, distance to be estimated from courthouse to point of execution of the process, per mile0.12 1/2

Return of process issued0.25

Holding sale of property under order of court2.00

Usual commissions upon sale.

Where the seizure and forfeiture is not made pursuant to a proceeding in court:

Seizing the illicit beverages or apparatus\$2.00

Mileage, distance to be estimated from courthouse to point of seizure, per mile0.12 1/2

Transporting illicit alcoholic beverages or apparatus, per mile.....0.12 1/2

Sales not made pursuant to an order of court are held by the director of the beverage department and not by the sheriff, see Section 562.39, Florida Statutes, 1941.

SHERIFFS

April 8, 1941.—041-219.

FEE—SERVICES OF JAILER

QUESTION: The county commissioners of Hernando County previously paid the county jailer \$1.00 per day, but the state auditor advised the sheriff that the jailer was entitled to \$2.00 per day. Since then the commission has paid the sheriff \$2.00 per day as jailer, but recently had an additional bill from the sheriff for \$1.00 per day for a helper, presumably employed as an additional guard or jailer. Is the sheriff entitled to reimbursement for this additional helper?

To Mr. John L. Ayers, Chairman, Board of County Commissioners, Hernando County, Florida:

I call your attention to the fact that Section 2838 and Section 4588 of the Compiled General Laws of Florida prevail over Section 8544, Compiled General Laws (Hillsborough County Commissioners vs. Jackson, 58 Fla. 210; 50 So. 243), and I also call your attention to Section 4588, Compiled General Laws, relating to the fees to be charged by the

JUDICIARY DEPARTMENT—Sheriffs

sheriffs of the several counties, and provided therein you will note that the sheriff is allowed \$2.00 per day for each guard. In construing this particular section, our Supreme Court, in the case of *Brown vs. St. Lucie County*, 114 Fla. 789; 153 So. 906, held that when the sheriff of a county in the exercise of his honest judgment, based upon a fair necessity therefor, employs guards or servants in connection with the county jail, which the law requires him to manage and look out for, that the county shall become liable to him for reimbursement for guards and servants hired at the statutory rates. Of course, the sheriff cannot recover more than the sum he actually pays his helper or guards. In your particular case, if the sheriff has employed two guards, one at \$2.00 per day and one at \$1.00 per day, and in his best judgment such employment is necessary, he is entitled to reimbursement.

SHERIFFS

April 10, 1942.—042-174.

FEES—SERVICES OF SUMMONS IN CRIMINAL CASES

QUESTION: What fee is a sheriff entitled to charge for making service of a summons issued in a criminal case in lieu of a warrant of arrest?

To Hon. Bryan Willis, State Auditor:

Sections 9, 12, 131 and 132 of Chapter 19,554, Acts of 1939, make provisions for the issuance of a summons instead of a warrant of arrest but make no provision as to the fees to be paid for the service of such summons. The general statute fixing fees for sheriffs in this state is Chapter 20,943, Acts of 1941, which act makes no mention of summons' in criminal cases but does provide a fee of \$2.00 for making an arrest or for executing a writ in an action at law.

The purpose of a summons in a criminal action as well as a warrant of arrest is to institute the action and the ultimate purpose is the same in each case. In my opinion, the primary purpose of issuing a summons in a criminal case in lieu of a warrant was to prevent the stigma of an arrest and to permit the trial without subjecting the defendant to the embarrassment of being taken into custody, and not necessarily for the purpose of reducing costs. In its broadest sense, a criminal proceeding might be called an action at law.

Therefore, the sheriff's fee for executing a summons in a criminal action is \$2.00. I find no authority for making a charge of only \$1.00 by the sheriff whether we consider the same as in the nature of a service of a common law writ or in the nature of an arrest.

SHERIFFS

December 19, 1942.—042-567.

FEES—SERVING MORE THAN ONE PROCESS AT SAME TIME AND PLACE

QUESTION: If a defendant is arrested on more than one warrant, the warrants being served at the same time and place, may the sheriff, in connection with the execution of each warrant, charge mileage at the rate of 12½c per mile for each mile traveled?

To Hon. W. Kenneth Barnes, County Attorney, Dade City, Florida:

Section 30.23, Florida Statutes 1941, relates to the compensation to be paid sheriffs and provides in part:

JUDICIARY DEPARTMENT—Sheriffs

"Mileage, distance to be estimated from courthouse door to point of execution of process, per mile each way, 12½c."

This provision contemplates that mileage will only be charged when the sheriff actually travels the miles charged for in serving the warrants. The charging for constructive mileage is prohibited by the provisions of Section 30.27, wherein it is provided:

"The mileage charged for must be actually travelled by the nearest and most direct route by the public highway."

It is my opinion that when the sheriff arrests a defendant on more than one warrant, the warrants being served at the same time and place, he is only entitled to charge mileage for the execution of one of the warrants.

SHERIFFS

June 5, 1942.—042-283.

FEES—TRANSFER OF PRISONERS

QUESTION: (1) What is the proper charge to be made by a sheriff where prisoners are transferred from one county within this state to another?

(2) What amounts and what charges can the sheriff properly make for returning prisoners from without the state into the state?

To Hon. John W. Muskoff, Attorney-at-Law, Jacksonville, Florida:

Answering first question:

(a) Where a warrant is issued from the sheriff's county and the arrest is made within the State of Florida, but outside of the county issuing the warrant, the sheriff of the county issuing the warrant may go for the prisoner, after he has been apprehended by the arresting officer, in the county where the prisoner is found and return such prisoner to the court or place of detention for the court, from which the warrant issued, charging therefor mileage both ways at the rate of 12½c per mile for himself or for the deputy whom he may send, from his courthouse to the jail or place where he gets the prisoner and return to this courthouse.

(b) In the case just described, the sheriff making the arrest may charge a similar mileage from his courthouse to the place of arrest and return for himself or his deputy.

(c) In case a sheriff, receiving a warrant from other than his county, makes the arrest and returns the prisoner to the county from which the warrant issues, he may charge mileage from the place of arrest to the courthouse where he delivers the prisoner and return to his own courthouse for himself or for his deputy at 12½c per mile.

(d) In each of the above cases the sheriff may charge mileage for the prisoner, and the expenses of subsistence incurred, in returning or delivering the prisoner, for the prisoner. (See *Traylor vs. State*, Fla., 9 So. 2d 417.)

(e) In hot pursuit the sheriff may follow an accused or one in process of being arrested until apprehending his charge, anywhere in the state and may charge mileage for himself in so doing from his courthouse door to the place of arrest and return at the rate of 12½c per mile each way, with mileage and subsistence for the return of the prisoner.

JUDICIARY DEPARTMENT—Sheriffs

In order that the county, where the warrant issues, may pay its moneys in connection with arrests thereunder only to its own arresting officers, as far as this is practicable, it would seem the sheriffs of the county where the warrant issues could be required by their county commissioners to return their own prisoners, arrested in other counties, from the asylum county detention. This involves a trilateral policy in the matter of arresting and returning prisoners outside of the sheriff's own county, to-wit:

(1) The policy of sending the warrant to the county, where the accused is, for service by an arresting officer of that county. This is compulsory in all cases, except when the accused is being hotly pursued.

(2) The policy of the sheriff making the arrest on a warrant, coming from another county, delivering his prisoner in his own jail or asylum until the sheriff of the county, issuing the warrant, shall come to return the prisoner to the proper warrant confinement place (the making of an arrest upon such a warrant has to be done by the sheriff of the county where the prisoner is to be found, but whether or not the officer making the arrest holds the prisoner for the arresting officer of the county issuing the warrant, is a matter of policy and is not compulsory either way).

(3) The policy of county commissioners allowing the return of a prisoner to the warrant issuing source by an officer of another county instead of by its own sheriff; the possibility of excess fee collections by the sheriff of the issuing county being affected and curtailed if the asylum county or arresting county sheriff is allowed to return the prisoner to the county issuing the warrant.

Inasmuch as a person arrested has the right to make bail at the place where arrested, if his case presents a ballable offense (*Ex Parte Hatcher*, 86 Fla. 330, 98 So. 72) and since the sheriff is not permitted to charge constructive mileage and, therefore, could not charge mileage in cases where he goes to return a prisoner, who had been arrested on a warrant from his county and was being held under such arrest in another county, where such prisoner is released on bond in the county of his arrest; the determination of a definite policy for sheriffs to follow in arresting, apprehending, returning and receiving persons and prisoners, charged with crime, inter-county; that is, where the warrant issues in one county and the sheriff arrests, not in hot pursuit, in another, as stated in these cases the determination of definite policies as to such division of mileage charges becomes important to the counties and to the arresting and returning officers.

Answering question 2:

The sheriff can charge 7c a mile for one officer going and returning in returning prisoners from without the State of Florida into the State of Florida for the actual distance traveled beyond the limits of this State, together with the same mileage for his prisoner.

In my opinion, the actual distance traveled beyond the limits of the State means, of course, mileage going and coming from the State line to the State line. In this kind of apprehension he may, of course, charge the actual and necessary expense incurred from the State line to his courthouse, going and coming, on account of returning the prisoner to Florida, for himself and prisoner.

JUDICIARY DEPARTMENT—Sheriffs

SHERIFFS

July 22, 1942.—042-366.

PROPERTIES OF OFFICE—ORDER OF SUSPENSION—
RECOVERY BY APPOINTEE

QUESTION: Former Sheriff Stone of Volusia County has retained two automobiles belonging to the County, which he refuses to turn over to his successor. What proceedings should be followed to obtain possession of such automobiles?

To Hon. Spessard L. Holland, Governor:

Section 319.02, Florida Statutes, 1941, among other things provides that:

"The owner of every motor vehicle in this state, except as herein otherwise provided, shall make application to the state motor vehicle commissioner of the state for and be granted an official 'certificate of title' to such motor vehicle, or shall present satisfactory evidence that such certificate covering such motor vehicle has been previously issued to the applicant . . . The said commissioner if satisfied that the applicant is the owner of such motor vehicle or otherwise entitled to have the same registered in his name, shall thereupon issue to the applicant an appropriate certificate of title over his signature, authenticated by his official seal."

Under this section you will note that the authority for issuance of certificates of title to motor vehicles is vested in the State Motor Vehicle Commissioner after this Commissioner becomes satisfied that the applicant is the owner of the motor vehicle involved.

Section 319.04, Florida Statutes, 1941, provides as follows:

"If the State Motor Vehicle Commissioner shall determine at any time that an applicant for a certificate of title of a motor vehicle is not entitled thereto, he may refuse to issue such certificate or to register such vehicle, and may for a like reason, and after notice and hearing, revoke registration already acquired, on any outstanding certificate of title."

From this you will note that the Commissioner may, upon determining at any time that the holder of a certificate of title of a motor vehicle is not entitled thereto, after notice and hearing, revoke registration already allowed and cancel any outstanding certificate of title.

In my opinion, the two automobiles which Mr. Stone retains should be replevied by the new sheriff and the Board of County Commissioners of Volusia County, jointly or by one of them separately, whichever is determined by the local authorities to be the better party plaintiff, my own opinion being that the County Commissioners would be, for the use of the new sheriff.

Upon filing the replevin suit, notice of hearing before the State Motor Vehicle Commissioner should be given Mr. Stone under Section 319.04, Florida Statutes, 1941, above quoted, for the purpose of revoking the registration of title in him and canceling his certificate. I will be glad to furnish the Commissioner with directions for holding such a hearing, including all notices thereof required, and assist him fully in its conduct.

Section 319.09, Florida Statutes, 1941, provides that:

"The owner or any person without the consent of the owner being first obtained, who shall operate a motor vehicle in this state under a

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registration number of this state without first securing a certificate of title, as herein provided, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars, nor more than one hundred dollars."

Under this section a motor vehicle owner is put on notice of the necessity of securing a certificate of title from the Motor Vehicle Commissioner before operating a motor vehicle in this State.

Section 319.03, Florida Statutes, 1941, provides that:

"In the event of the sale or other transfer in this State of the ownership of a motor vehicle for which a certificate of title has been issued under Sec. 319.02, the holder of such certificate shall endorse on the back of the same an assignment thereof with warranty of title in form of affidavit printed thereon, with a statement of all liens or incumbrances on said motor vehicle, and deliver the same to the purchaser or transferee at the time of the delivery to him of such motor vehicle. *The purchaser or transferee shall within ten days thereafter, present such certificate, assigned as aforesaid, to the State Motor Vehicle Commissioner accompanied by a fee of one dollar, whereupon a new certificate of title shall be issued to the assignee.* For failure of such purchaser, transferee or assignee to make application within ten days as aforesaid, he shall be considered to be driving a motor vehicle without a certificate of title and upon conviction thereof shall be fined not less than five dollars nor more than fifty dollars."

Under this section purchasers of motor vehicles, under assignments of title certificates, are required to present the old certificate to the Motor Vehicle Commissioner for the issuance of new certificates in cases of transfers of title of a motor vehicle.

This statute gives a purchaser full opportunity of knowing the status of the title of the motor vehicle about to be purchased before his consummation of such purchase and would seem to afford ample protection to anyone becoming an innocent purchaser of an automobile that could not be lawfully sold by the holder of a certificate which had been canceled or otherwise nullified.

Summarizing all of the above, I think the remedy in the case presented is adequate as provided by the statutes quoted and that the suggested proceedings above mentioned will accomplish same.

CRIMINAL COURT OF RECORD

December 5, 1942.—042-543.

JUDGE—COURT OF RECORD—ASSIGNMENT

Question: May the Judge of the Court of Record of Escambia County be assigned to hold court in criminal courts of record?

To Hon. Spessard L. Holland, Governor:

The language of the Constitution creating the court of record of Escambia County, referred to by Judge Ernest E. Mason, Judge of Court of Record of Escambia County, whose letter to you of November 30th you have submitted to me, was, in my judgment, used to emphasize the preservation in the new court of all the jurisdictional powers of the original court and the powers and duties of its officers insofar as criminal cases were concerned.

Section 32.06, Florida Statutes, 1941, authorizes the assignment of Judges of Criminal Courts of Record, courts of limited jurisdiction

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from whose judgments appeal is in a class of cases to the Circuit Court and in others to the Supreme Court.

The Court of Record of Escambia County is not a Criminal Court of Record, but one of much broader jurisdiction. All appeals from that court, in both criminal and civil cases, are to the Supreme Court. No judge of a Criminal Court of Record is assignable to that court, but only Circuit Judges, whose status in our system is higher in Escambia County in only one respect, i.e., jurisdiction to try capital cases.

In view of the foregoing, I am of the opinion that the judge of the Court of Record of Escambia County may not be assigned to preside in a Criminal Court of Record in some other county.

COUNTY JUDGE'S COURT

October 20, 1941.—041-623.

CONSTABLES—DUTIES

QUESTION: What are the duties and authority of Constables in County Judge's Courts?

To Hon. F. L. Anderson, Sheriff, Dixie County, Cross City, Florida:

First, as to Appearance Bonds. Section 77 of the Criminal Code (Chapter 19554, Acts of 1939) provides in paragraph 2:

"In all criminal cases instituted or pending in the courts of county judges or justices of the peace or other committing magistrates, all bonds given by defendants therein at any time before the trial, shall be approved by the sheriff, county judge, justice of the peace, or other judge trying the case, as the case may be; and all bonds given by defendant after preliminary hearing shall be approved by the sheriff, county judge, justice of the peace or other committing magistrates, except appeal bonds, which shall in the county judge or justice of the peace court be approved by such county judge or justice of the peace; and in appeals from the circuit court, court of crimes, criminal courts of record, or other courts having a clerk, the bond may be approved by the judge or the clerk of the court."

Section 8435 of the Compiled General Laws also provides:

"From the time of the return of the warrant until the time of the trial, the accused may give bail with one or more sureties, to be approved by the county judge, justice or sheriff, for his appearance at the time of the trial, in such sum as shall be named by the county judge or justice not exceeding five hundred dollars; or in the event of failure to furnish security, he may be committed to the county jail for safe keeping, by warrant of said judge or justice, or left in custody of the sheriff or constable."

I call your attention, however, to the fact that my predecessors in the office of Attorney General have rendered opinions to the effect that a constable may take and approve a bail bond when he arrests a prisoner and such prisoner desires to give bond because of the holding in the case of *ex parte Hatcher*, 86 Fla. 330, 98 So. 72, that it was the right of a prisoner when taken into custody or process to give bail for his appearance. This is the only bond which a constable is authorized to take and approve. A constable can approve that class of bonds referred to in Section 8347 of the Compiled General Laws or Section 77 of the Criminal Code, which are bonds the prisoner is required to give after he has had a preliminary hearing and has been bound over

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to a proper court for trial. (See Biennial Report of the Attorney General, 1929-1930, page 345, and Biennial Report, 1935-1936, page 276.)

Secondly, with reference to the approval of fine and cost bonds by a constable. Section 260a of the Criminal Code provides:

"(1) Persons convicted of crimes, who shall have a pecuniary fine or sum of money assessed or adjudged against them as punishment therefor, shall have the right on being taken into custody by the proper officer of the court, or prior to such arrest, to give bail for the payment of such fine and the costs of prosecution. Such bail shall be by bond, conditioned for the payment of the fine and costs, executed by the defendant and one or more good and responsible persons to be approved by the court, if in session at the time; otherwise by the sheriff or the officer charged with the execution of the judgment.

"(2) The bond shall be made payable in ninety days from the date thereof to the governor of this state and his successors in office, and if not paid at the expiration of the ninety days, the sheriff or other officer aforesaid shall indorse on the bond that default has been made in the payment, and having signed such indorsement, shall file the bond with the clerk of the court in which judgment was rendered, and the clerk shall forthwith issue execution for the amount of the fine and costs against the security or bail, as if there had been judgment at law on such bond, and the same proceedings shall be had as in cases of other executions, and the person convicted shall be liable to be proceeded against, as if no such bond had been given, until the same has been fully paid and satisfied."

Since under Section 8296 of the Compiled General Laws the Sheriff of the county or any constable shall be the executive officer of the county judge's court, it seems to me that under Section 260a a constable, if he has properly taken a person into custody, may take a fine and costs bond, which bond shall be approved by the court if in session at the time, otherwise by the constable, if he is the officer charged with the execution of the judgment.

Thirdly, as to the acceptance of the payment of fines by constables. I find no provision of law authorizing a constable to accept the payment of fines at any time. Section 8444 of the Compiled General Laws, applicable to a county judge's court, provides:

"All fines imposed by any such court, if paid before the accused is committed, shall be received by the justice of the peace who constituted the court before which the accused was convicted, and by such magistrate paid over to the county treasury within ten days after the receipt hereof, to be disposed of according to law.

"If the accused be committed, payment of any fine imposed upon him shall be made to the sheriff of the county, who shall, within ten days after the receipt thereof, pay over the same to the county treasury for the purpose aforesaid."

Fourthly, as to the commitment of a convicted prisoner. Since the statute provides that the sheriff of the county or any constable shall be the executive officer of the county judge's court it seems proper for a county judge to commit a convicted person to the custody of either the sheriff or a constable, which person is to be delivered to the jailer. Upon such delivery by a constable he no longer has custody of the prisoner and cannot thereafter accept a fine and costs bond from the prisoner.

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As I said earlier in this letter, this is not an official opinion. If at your request the State Auditor should request an official opinion on this subject I shall be happy to render it to him.

COUNTY JUDGE'S COURT

September 4, 1942.—042-434.

JUDGE—CHANGING SENTENCE

QUESTION: A number of diseased prostitutes were arrested and sentenced by a County Judge to serve six months in the County jail. It now appears that a number of these women have places where they can go. Has the County Judge authority to change or reduce the sentences which he has heretofore imposed?

To Hon. Spessard L. Holland, Governor:

Assuming that the sentences imposed were valid, that the term of court at which they were imposed has now expired, and that the defendants have entered upon the service of their respective sentences, it is my opinion that the Court has lost jurisdiction over these cases and is now without authority to change or modify the original sentences.

In discussing this question, the Supreme Court of Florida in the case of *Tanner vs. Wiggins*, reported in 45 So. 459, said:

" * * * It seems to us the weight of reason and authority is against the existence of such a power, especially where, as with us, exclusive control over the subject of pardons and of commutation and mitigation of penalties is lodged by our Constitution in other officials than the judges of the courts * * * "

COUNTY JUDGE'S COURT

November 27, 1942.—042-536.

JUDGE—FEES

QUESTION: May County Judges charge the Board of County Commissioners, or any other person of authority, fees for services rendered under the provisions of Section 200.18, Florida Statutes, 1941?

To Hon. Bryan Willis, State Auditor:

Public officers have no legal claim for official services rendered, except when, and to the extent that, compensation is provided by law, and when no compensation is so provided rendition of such services is deemed gratuitous (*Rawls vs. State*, 98 Fla. 103, 122 So. 222; *State vs. Reardon*, 144 Fla. 755, 154 So. 868; 46 C. J. 1014, Section 233). Although Section 200.18, Florida Statutes, 1941, requires the county judge to "furnish the county assessor of taxes . . . a complete list of all tangible personal property belonging to the estate of any deceased person as shown by the records" in his office, no mention is made of compensation for the furnishing of such list. However, Section 36.17, Florida Statutes, 1941, provides that the "fees and charges for services required by law to be performed by the county judge shall, in all cases be the same as the fees and charges now or hereafter allowed by law to clerks of the circuit court" for like or similar services. If the clerk of the circuit court was required by law to make up a similar list of property to that required of the county judge by Section 200.18, Florida Statutes, 1941, Section 28.24, Florida Statutes, 1941, would seem to apply and the following items might be used to measure the fees and charges, to-wit:

JUDICIARY DEPARTMENT—County Judge's Court

"1. Writing any paper (that is writing the list of property) other than herein specially mentioned, same as for copying (which is 25c for the first 100 words and 12½c for each additional 100 words).

"2. Search of one year's standing or less\$25."
I do not think that the county judge would be entitled to make any charge for affixing his seal of office to the paper as Section 200.18, Florida Statutes, 1941, does not seem to contemplate an instrument under the seal of the county judge. The county judge is only required to furnish a *complete list* which does not seem to require a certificate under the seal of the county judge.

Therefore, as the services are performed for the benefit of the county (no state taxes being assessed on tangible personal property), I am of the opinion that the county judge may bill the county for the writing of the paper at the rate of 25c for the first 100 words and 12½c for each additional 100 words and the making of the search for the information necessary to make the report, at the rate of 25c for one year's search, but I do not think that he would be entitled to make any charge for putting his seal on the report as no report under seal seems to be required.

COUNTY JUDGE'S COURT

February 4, 1941.—041-34.

JUDGE—FEES—SEARCHING MARRIAGE RECORDS

QUESTION: To what fees are County Judges entitled for making a search of the records for a marriage license previously issued?

To Hon. J. M. Hearn, County Judge, Live Oak, Florida:

The fees for this service are covered by Section 5200, Compiled General Laws, 1927, which provides that all fees of the county judge other than for certain services performed as a judge of probate, shall be the same as the fees of the Circuit Court Clerk.

The Florida Supreme Court in the case of State ex rel Murphy vs. Harlee, 100 Fla. 1562, 131 So. 866, held that the Section referred to was Section 3084, Revised General Statutes, which reads in part:

"Searches of one year's standing or less.....\$0.10
Of more than one year's standing..... 0.15"

COUNTY JUDGE'S COURT

August 7, 1941.—041-435.

JUDGES TRANSFERRED—SALARY

QUESTION: Judge G. H. Cornelius, County Judge of Hillsborough County, was sick and the County Judge of Pasco County was assigned to that office by Governor Holland for a period of thirty days under Chapter 16919, Acts of 1935. Shall the Board of County Commissioners deduct the salary of the assigned County Judge from fees payable to that office, and if the fees of the office are still in excess of enough to pay the resident County Judge, does the resident County Judge forfeit his salary?

To Hon. W. M. Wainwright, State Auditor:

The Act with reference to compensation of County Judges reads:
"The . . . county judge . . . in all counties of the State of Florida

JUDICIARY DEPARTMENT—County Judge's Court

having a population of more than . . . according to the last . . . census, now paid in whole or in part by fees, salary or commissions or by one or more of said methods of payment, shall receive as his yearly compensation for all his official services from the whole or a part of the fees, salary or commission so collected the following sum only: All of the net income from such office not to exceed . . . per annum."

The term "net income" is defined by the statute as:

"The term 'net income' as provided by this law shall mean the residue of the income from such office after deducting all reasonable expenditure for the salaries of clerks and assistants and the necessary expenditures for the proper operation of said office."

After consideration of the foregoing statutes, I am of the opinion that the Board of County Commissioners should in the first instance pay to the transferred and assigned County Judge the same compensation in all matters in which said assigned County Judge renders service, such compensation to be the same, that the resident County Judge would have received had he acted, and that such amount paid to said assigned County Judge should be by the Board deducted from the fees and emoluments which may afterwards become payable to the resident County Judge, and if after this deduction is made there is still a sufficient amount left of the total fees earned by said office for the year to pay the resident County Judge the maximum amount allowed him by law, that same should be paid in full.

COUNTY JUDGE'S COURT

April 8, 1942.—042-172.

PROSECUTING ATTORNEYS—FEES

QUESTION: Are prosecuting attorneys for county judge's courts entitled to collect a conviction fee of \$5.00 in cases where cash bonds are estreated and the defendant is not brought to trial?

To Hon. Bryan Willis, State Auditor:

This question is controlled by Section 2156, C. G. L. 1927, which provides that the prosecuting attorney for the county judge's court shall receive the same fees for conviction as are now or may hereafter be provided by law for attorneys in county courts for conviction. The conviction fee for attorneys in county courts is governed by Section 8280, C. G. L. 1927, which provides that such attorney shall receive \$5.00 for each conviction. Said Section 8280 was amended by Chapter 19,321, Acts of 1939, so as to provide compensation to the county prosecuting attorney in cases of bond estreature which provision further provides for the conviction fee in case the defendant is later tried, in which case any amount paid under the bond estreature is deducted from the conviction fee. No mention is made of bond estreatures under Section 2156, supra, and the provisions added to Section 8280, supra, in 1939 as to compensation in cases of bond estreatures, do not relate to conviction fees and are limited to cases in the county court.

I am, therefore, of the opinion that the prosecuting attorney for county judges' courts is not entitled to collect a conviction fee in cases where bonds are estreated and the defendant is not brought to trial. The estreature of a bond does not amount to a conviction.

JUDICIARY DEPARTMENT—Courts of Justices of the Peace**COURTS OF JUSTICES OF THE PEACE**

May 14, 1941.—041-255.

CONSTABLES—DEPUTY—APPOINTMENT

QUESTION: Is a constable in a district of a county which has a population of about 8,000 entitled to a deputy constable?

To Mr. E. E. Whiddon, Crestview, Florida:

I find no authority of law that would permit you to have a deputy constable. Sections 4598 and 4597(2), seem to be the only authority for the appointment of a deputy constable, and in each instance it provides for a deputy constable in a district where the population is largely in excess of that in your district.

COURTS OF JUSTICES OF THE PEACE

August 27, 1942.—042-424.

CONSTABLES—FEES

QUESTION: Are fees of constables, under Section 37.20, Florida Statutes, 1941, determined by the schedule of fees set up in Section 30.23, Florida Statutes, 1941, as amended by Section 1, Chapter 20,943, Laws of Florida, Acts of 1941, or by some other schedule?

To Hon. Bryan Willis, State Auditor:

Section 37.20, Florida Statutes, 1941, provides that the fees "of constables shall be the same as are at this time allowed the sheriffs for like services." The fees of sheriffs as provided in the Florida Statutes, 1941, as enacted and prior to the insertion of the amendments therein pursuant to Section 16.28, Florida Statutes, 1941, were covered by Section 30.23, which was taken from and was the same as Chapter 10,091, Laws of Florida, Acts of 1925. The said Florida Statutes, 1941, was one enactment; however, certain Sections therein including Section 30.23 were amended by laws enacted at the 1941 Session of the Legislature, which amendments did not become a part of the statute as enacted but were included in the permanent edition as printed under the direction of the Legislature (see Section 16.28 aforesaid). The provision contained in Chapter 10,091, Laws of Florida, Acts of 1925, or Section 30.23, Florida Statutes, 1941, as enacted *but not as amended and published*, is the statute fixing the fees of the constables and not Chapter 20,943, Laws of Florida, Acts of 1941, which now appears as Section 30.23, Florida Statutes, 1941, as amended. (*Williams vs. State*, 100 Fla. 1570, 131 So. 864). Therefore, Chapter 10,091, Laws of Florida, Acts of 1925, is the statute from which to determine fees of constables.

COURTS OF JUSTICES OF THE PEACE

October 21, 1941.—041-601.

CONSTABLES—FEES—ARRESTS AND MILEAGE OUTSIDE COUNTY

QUESTION: May a constable properly claim fees for arrest and mileage in effecting an arrest outside his county?

To Hon. Bryan Willis, State Auditor:

Under statutes applicable at the time, some measure of discretion was vested, and still reposes, in the Boards of County Commissioners to determine the validity of any claim against the county, and they

JUDICIARY DEPARTMENT—Courts of Justices of the Peace

are required to pay only when the claim is just, correct and reasonable. There is a positive prohibition against the payment of claims for constructive mileage, for any illegal or unnecessary item or charge in any frivolous case. Section 1784 Revised General Statutes, Section 2835 Compiled General Laws.

In none of these cases do any of such points appear to have been presented.

In the case of *State ex rel. vs. Barfield*, 158 So. 87, cited by Mr. Thornal, the court mentioned the fact that the amount and bona fides of the cost bill were not challenged. Just what was the defense interposed, the report of the case does not disclose. It cites the case of *Gray vs. Leon County*, 96 Fla. 476, 118 So. 305, also cited by Mr. Thornal, as well as *Osceola County vs. State*, 155 So. 119. In *Gray vs. Leon County*, no question was raised as to the territorial powers of constables. The same is true of the *Osceola County* case.

In the case of *State, ex rel. Bell vs. Stinson, et al.*, 154 So. 246, the court sustained the ruling of the lower court, quashing an alternative writ of mandamus seeking payment of sheriff's fees remitting, in effect, the realtor to his remedy at law to establish his claim, presumably under Section 1786 Revised General Statutes, Section 2837 Compiled General Laws, in which case the county would be afforded an opportunity to defend both as to the law and the facts and the exercise of the power in its Board of County Commissioners under Section 1784 Revised General Statutes, above cited.

In the *Osceola County* case the then Justice Ellis, in his dissenting opinion, made the very pertinent observation that if such obligation as was contended for in that case rested upon the counties, Justices of the Peace would have the power to wreck the finances of a county with little effort. He also said that the theory of that case was a convenient doctrine for the sheriffs' and county officers' organizations.

The practical effect of recognizing as valid every claim against a county, without an opportunity for the guardians of its funds to test its validity in the usual and statutory method, is to say to Justices of the Peace and Constables that, however, frivolous and unnecessary to the peace and dignity of the State the issuance and service of a warrant of arrest may be, you shall collect your fees, and to the counties, that your only duty is to pay, and that without question. However, if our views of the real question involved in this opinion are wrong, the new Criminal Code appears to have materially changed the law.

Under Section 4 of Chapter 19554, of the new Criminal Code, 1939, warrants issued by committing magistrates, while directed to all and singular the sheriffs and constables of the State, may be executed only by a sheriff or constable of the county in which the arrest is made, unless in hot pursuit. Section 9 provides for the issuance of a summons (to be served as summons in civil actions, Section 10) unless the magistrate has reasonable grounds to believe that the person complained against will not appear in response to a summons. It is pertinent to inquire as to what are reasonable grounds and who shall be the judge thereof.

Since arrests are to be made by an officer of the county in which the arrest is made, the arresting officer is the official required to fully execute the warrant by making the arrest, and, if no bond is given, by taking the prisoner before the court. Therefore, using the *Leon County* case, *supra*, as an example, the arrest would properly have been made by the sheriff or a constable of Manatee County, and

JUDICIARY DEPARTMENT—Courts of Justices of the Peace

returned by him, no bond being given, to the court issuing the warrant. The costs to which the executing officer would be entitled would be $12\frac{1}{2}$ cents per mile from the point of arrest, for himself and prisoner, to the court issuing the warrant. He would be entitled to no mileage for his return to his home county.

The question, therefore, as to whether or not a constable may go outside his own district and county to effect an arrest, is no longer an issue under the Criminal Code. County Commissioners would still have the power to reject, on the ground of lack of necessity, a claim by a constable, or a sheriff, for that matter, of the county in which the warrant issued, for fees for arrest and mileage, when the warrant can be delivered by much more inexpensive means to the only officer authorized to make the arrest and whose duty it is to deliver the arrested person as ordered by the court issuing the warrant.

As to the power of constables to proceed to and execute a warrant of arrest in another State, the question appears to be easily answered. No State process in criminal procedure is effective in another State except under the extradition acts under which a constable, a sheriff, or any other person, may be appointed specifically for the purpose of returning a fugitive from justice to this State.

My conclusions, therefore, are:

1. That the question of the territorial jurisdiction of constables has never been squarely presented to the Supreme Court, and
2. That if wrong in the foregoing position, the question is settled by the plain provisions of the Criminal Code, *supra*.

COURTS OF JUSTICES OF THE PEACE

October 23, 1941.—041-601-1.

CONSTABLES—FEES—ARRESTS AND MILEAGE OUTSIDE COUNTY

QUESTION: May a constable properly claim fees for arrests and mileage in effecting an arrest outside his county?

To Hon. Bryan Willis, State Auditor:

Supplement to opinion of October 21, 1941.

In the former opinion I stated that, regardless of the scope of previous Supreme Court decisions, the Criminal Code had definitely fixed the powers of the officers in question, insofar as service of criminal process is concerned. That code, by the concluding language in the 321st and last section thereof, clearly indicates that the legislative intent was to cover the whole field of criminal procedure. It says: "This Act * * * shall govern the procedure in all criminal cases commenced or instituted on and after said time." (Effective date 12:01 o'clock A. M., October 10th, 1939). Some one hundred and eleven odd sections of pre-existing law were specifically repealed, but Section 1784, Revised General Statutes, (Section 2835 C. G. L.) conferring upon Boards of County Commissioners the right to reject any invalid, unjust, incorrect, unreasonable claim, or a claim based upon constructive mileage, or for any illegal or unnecessary item or charge in any frivolous case, was not repealed, but continues in full force and effect. Neither was the following section, 1786 Revised General Statutes, (2837 C. G. L.), prescribing the method by which any such officer may test the validity of his claim, repealed. The case of *State, ex rel. Bell vs. Stinson*, cited in the former opinion, was disposed of under the above cited statutes,

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and the validity of the claims there was never established. This according to the writer's own personal knowledge, he having represented the county in that case.

Using one of the cases cited in the former opinions as an example—the Barfield case: Under the Criminal Code, the warrant would have been delivered by mail to the sheriff or some constable in Volusia County, the receiving officer would have made the arrest and, if no appearance bond was given, would have returned the prisoner to the court issuing the process, or to the county jail of the county in which the process issued. For that service, the officer would have been entitled to a total of twenty-five cents per mile for the distance traveled from the point of arrest to the court of issuance, or to the county of issuance, (12½ cents for himself and 12½ cents for the prisoner, per mile), plus twelve and one-half cents per mile from the county seat of the county of his residence, or the point in his county where he received the process to the point of arrest by the most direct and practicable route, plus the fees for making the arrest and endorsing his return on the warrant.

In all prosecutions the judicial officer before whom the same is instituted, must issue a summons instead of a warrant, "unless he has reasonable ground to believe that the person against whom the complaint was made will not appear upon a summons," which summons may be served in the same manner as summons (ad respondendum) in a civil action. Whether a summons or a warrant shall issue, is a question which, in my opinion, the issuing officer may not arbitrarily and conclusively determine, but might well be a subject of controversy as to the reasonableness and necessity of the action, determinable in a court of law.

The provision that an arrested person shall be afforded an opportunity to give an appearance bond in the county where arrested, is a further clear indication that costs in executing criminal process were intended by the Legislature to be materially reduced; also to the same effect, the provision that for certain major offenses a warrant may be issued in a county where the accused is to be found, returnable to the county where the case is triable.

While all warrants are to be directed to all and singular the sheriffs and constables of the State, and are to be executed only as provided by said Section 4, that does not mean that a sheriff or constable may not proceed to the county where the arrest is made and there accept custody of the prisoner from the officer who made the arrest, and then return him to the court or county of issuance, but it does mean, in my opinion, that he would not be entitled to mileage for the distance traveled to the point where he so received custody of the prisoner.

While I am now of the opinion that a constable may serve criminal process anywhere in the county in which his district is located, I am not entirely free from doubt on the point, because it may well be that he would be limited to such service within the boundaries of the district for which he is elected, especially as to process issued in another county.

COURTS OF JUSTICES OF THE PEACE

June 11, 1941.—041-326.

CONSTABLES—FEES—COURT ATTENDANCE

QUESTION: To what fees are constables entitled where the defendant pleads guilty before a justice of the peace and when the constable is summoned to testify before a grand jury?

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To Hon. Phillip D. O'Connell, State Attorney, Fifteenth Judicial Circuit, Harvey Building, West Palm Beach, Florida:

It is my opinion that constables are ordinarily entitled to the payment of a fee for court attendance where the defendant pleads guilty before a Justice of the Peace. Section 4597, C. G. L., 1927, provides that the fees of constables shall be the same as those allowed sheriffs for like services, and Section 4588, C. G. L., 1927, provides for the fee to be charged by sheriffs for attendance on all courts. *Williams vs. State*, 100 Fla. 1570, 131 So. 864, and *Calhoun vs. Liddon*, 103 Fla. 833, 138 So. 389. A constable, however, may not be entitled to a fee for attendance at court when his attendance is not necessary, as where it is positively ascertained that the defendant will plead guilty and where there are no duties to be performed by the constable before the court, but in the ordinary case the mere fact that a defendant is expected to plead guilty does not seem to be sufficient to remove the necessity of the constable's attendance at court so as to deprive him of such fee for attendance.

It is further my opinion that constables are not entitled to witness fees or mileage when summoned to testify before a grand jury, under paragraph (d) of Section 43 of Chapter 19554, Laws of Florida, Acts of 1939, which provides that no constable, or certain other officers, shall be entitled to witness fees or to mileage when summoned to testify in any court sitting in the county in which he holds office, is employed, or has his residence. The Florida Supreme Court a few weeks ago in *Trawick vs. State*, 146 Fla. 666, 1 So. (2d) 641, upheld the paragraph in question. This opinion is in conformance with an opinion rendered by this office on September 30, 1939, and reported in the Biennial Report, 1939-1940, page 88.

COURTS OF JUSTICES OF THE PEACE

April 19, 1941.—041-225.

CONSTABLES—MAY NOT ACCEPT DEPUTY SHERIFF APPOINTMENT

QUESTION: Is it illegal for a constable to accept an appointment and act as a Deputy Sheriff?

To Mr. E. E. Brooks, DeLeon Springs, Florida:

The former Attorney General Fred H. Davis, ruled under date of August 15th, 1927, that the above was illegal, the pertinent part of his opinion being as follows:

"Section 15 of Article XVI of the Constitution of the State of Florida reads as follows:

'Section 15. No person holding or exercising the functions of any office under any foreign government, under the government of the United States, or under any other State, shall hold any office of honor or profit under the government of this State; and no person shall hold, or perform the functions of, more than one office under the government of this State at the same time; provided, notaries public, militia officers, county school officers and commissioners of deeds may be elected or appointed to fill any legislative, executive or judicial office.'

"A deputy sheriff 'performs the functions of' the duties of the office of sheriff under authority of law. See Sections 2881 to 2883 of the Revised General Statutes of Florida. As a deputy sheriff such officer has the right to do anything that the sheriff can do except

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appoint a deputy. See *Guarantee Trust Company vs. Buddington*, 23 Fla. 514.

"It, therefore, appears to be plain that it is against the spirit as well as the letter of Section 15 of Article XVI of the Constitution of this State for a duly elected and qualified constable to accept appointment as and perform the duties of deputy sheriff."

I concur in the conclusion reached in the opinion quoted above.

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October 29, 1941.—041-627.

CONSTABLES—MAY NOT ACCEPT DEPUTY SHERIFF APPOINTMENT

QUESTION: Is it permissible for a person to be a Constable and Deputy Sheriff at one and the same time?

To Hon. Murray Sams, State Attorney, DeLand, Florida:

Under date of August 15, 1927 a former Attorney General rendered an opinion on this question, the pertinent part of which is as follows:

"Section 15 of Article XVI of the Constitution of the State of Florida reads as follows:

'Section 15. No person holding or exercising the functions of any office under any foreign government, under the government of the United States, or under any other state, shall hold any office of honor or profit under the government of this State; and no person shall hold, or perform the functions of, more than one office under the government of this State at the same time; provided, notaries public, militia officers, county school officers and commissioners of deeds may be elected or appointed to fill any legislative, executive or judicial office.'

"A deputy sheriff 'performs the functions of' the duties of the office of sheriff under authority of law. See Section 2881 to 2883 of the Revised General Statutes of Florida. As a deputy sheriff such officer has the right to do anything that the sheriff can do except appoint a deputy. See *Guarantee Trust Company vs. Buddington*, 32 Fla. 514.

"It, therefore, appears to be plain that it is against the spirit as well as the letter of Section 15 of Article XVI of the Constitution of this State for a duly elected and qualified constable to accept appointment as and perform the duties of deputy sheriffs."

On April 19, 1941 I concurred in the conclusion reached in the above quoted opinion and I now reaffirm that concurrence.

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January 9, 1942.—042-15.

CONSTABLES—POWERS IN CRIMINAL PROCEEDINGS

QUESTION: (1) Do constables have power to admit to bail?

(2) Do constables have power to take and approve bail bonds (allowed and fixed by proper officers): (a) before preliminary hearing; (b) after preliminary hearing; and (c) after conviction and sentence?

(3) Do constables have power to take and approve fine and costs bonds?

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- (4) Do constables have power to take and receive payment of fines?
- (5) Do constables have power to receive convicted defendants, on commitment, for delivery to the Sheriff?
- (6) Do constables have power to act as bailiffs for county judges' courts during term?
- (7) Do constables have power to summons petit jurors?

To Hon. Bryan Willis, State Auditor:

(1) Constables have no power to admit accused or arrested persons to bail, except insofar as authorized by statute and then only to the extent and at the times authorized by the statute (8 C. J. S. 85, 86, Section 40). There are no such statutes in this State.

(2) (a) In cases where constables make arrests upon a warrant or other process issued by a court or judicial officer (who should enter the amount of the bond on the warrant or process) they have power to take and approve bail bonds in the amount fixed by the court or judicial officer and entered on the warrant or process. (Ex parte Hatcher, 86 Fla. 330, 98 So. 72). However, where arrests are made without a warrant the person arrested must be carried before some magistrate without unnecessary delay, who should fix the bond; constables are given no authority to fix such a bond (Section 23, Chapter 19554, Acts of 1939). Where the person is arrested, either with or without a warrant, and carried before a magistrate and bond is allowed for appearance, at a later date, for trial or preliminary hearing, such bonds must be approved by the sheriff or the magistrate hearing the case and cannot be taken and approved by a constable (Section 8435, C. G. L.; Section 77, Chapter 19554, Acts of 1939).

(b) After the preliminary hearing has been had or waived and the accused is held for trial, in the proper court, and bond is allowed, such bond is required to be taken and approved by the sheriff or the magistrate holding the preliminary hearing and cannot be taken and approved by a constable (Section 77, Chapter 19554, Acts of 1939).

(c) Appeal bonds, allowed after conviction, are required to be approved by the sheriff or the judge or clerk of the court, if the court have a clerk, and cannot be taken and approved by a constable (Section 77, Chapter 19554, Acts of 1939).

(3) Since persons convicted and sentenced to pay a fine and costs of court have the right, on being taken into custody, to give bail by bond for the payment thereof, which bond must be approved by the court if in session and if not in session by the officer charged with the execution of the judgment, constables who have properly taken the convicted person into custody for the purpose of delivery to the sheriff, may take and approve bonds for fines and costs so long as they have custody of the prisoner, otherwise they have no power to take and approve such bonds (Sections 8294 and 8296, C. G. L.; Section 263, Chapter 19554, Acts of 1939). Upon delivery to the sheriff the constable would be no longer in custody of the prisoner and could not accept fines and costs.

(4) Fines imposed by justices of the peace and county judges' courts must be received by the justice of the peace or county judge, if paid before commitment, and by the sheriff after commitment (Section 8444, C. G. L.). Therefore, constables have no power to take and receive voluntary payments of fines. However, where sentences impose fines executions may be issued thereon as on judgments in civil actions, and the constable, being co-executive officer, may execute such process if it is placed in his hands, but not otherwise (Section 263, Chapter 19554, Acts of 1939).

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(5) Constables are co-executive officers of county judges' and justice of the peace courts (Sections 8294, 8296, C. G. L.). The convicting court upon sentencing the defendant is required to forthwith commit him to the custody of the sheriff (Section 262, Chapter 19554, Acts of 1939), as the constable is a co-executive officer of the justice of the peace and county judges' courts it would seem that he may deliver the defendant to the sheriff or his jailer under commitment from the court.

(6) Constables cannot act as bailiffs for county judges' courts during term. The statutes require the sheriff of the county or his deputy to "attend each term of the . . . county judge's court in his county." (Section 4573, C. G. L.).

(7) Petit jurors in county judges' courts in counties having no county court, criminal court or court of record are required by statute to be summonsed by the sheriff and cannot be summonsed by a constable (Section 4468, C. G. L.). Petit jurors for justice of the peace courts may be summonsed by the constable when acting as executive officer for such court, or by the sheriff in case he is acting as executive officer (Section 5228, C. G. L.). County judges' courts in counties having county courts, criminal courts or courts of record seldom have petit jurors, therefore, no opinion is expressed herein as to them.

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February 27, 1941.—041-87.

CONSTABLES—SERVICE OF PROCESS

QUESTION: Has a Constable in one District of a County authority to serve process outside of his District and charge mileage therefor?

Hon. S. E. Stone, Sheriff, Volusia County, DeLand, Florida:

This office has for many years taken the view that a constable has the authority to serve process of the county judge's court and justice of the peace courts in any district of the county under the provisions of Section 4595, Compiled General Laws 1927, which reads:

"Any constable of the county in which the process issued may serve process of the county judge's courts and justice of the peace courts in any district of said county where the same may be lawfully served: Provided, he shall not be entitled to greater mileage in any case in serving writs from courts of justices of the peace than he would be if the writ issued from such court in the district in which such constable resides and for which he was elected."

A constable is the executive officer of the court of the justice of the peace district in which he is elected, and as such is usually given preference in the service of process issuing from that court, but this is not required by any statute, and hence the justice of the peace would be within his legal right to deliver process to the sheriff or to another constable of another district if he saw fit. Similarly, the sheriff is the executive officer of the county judge's court, and as such is usually given preference in the service of process issuing from that court, but nevertheless the county judge has the legal right to determine whether he will place process issuing from his court into the hands of the sheriff for service, or into the hands of a constable for service.

When a constable serves a writ issuing from the court of a justice of the peace in a district other than that in which the constable resides, and for which he was elected, he is entitled to no greater mileage than if the writ had issued from the court of the justice of the peace in the constable's own district, in accordance with the proviso in Section 4595 quoted above.

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March 16, 1942.—042-131.

CONSTABLES—SERVICE OF PROCESS

QUESTION: Are constables authorized to execute criminal and civil process issued out of court of record of Escambia County, Florida?

To Hon. George Trawick, Clerk, Court of Records, Pensacola, Florida:

Constables do not have general authority to execute criminal and civil process issued out of the court of record of Escambia county as the sheriff is the executive officer of that court. However, there seems to be one exception to this. In actions begun in your court against defendants who do not reside in Escambia county the constables have authority under section 2598, R. G. S., as amended by Chapter 9318, Acts of 1923, to serve process on such defendants. This would seem to be true even if the defendant is found in Escambia county. The condition giving the constables authority to serve the process is that the defendant is not a resident of Escambia County.

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March 1, 1941.—041-96.

CONSTABLES—TERRITORIAL JURISDICTION

QUESTION: What official powers have Constables?

To Hon. Carl Golden, Constable, District No. 3, Wildwood, Florida:

A constable ordinarily has no official powers outside of his own district, unless such powers are expressly or impliedly granted by the constitution or statutes.

The statutes of Florida have granted to constables the power to serve process of county judges' courts and justice of the peace courts in any district of his county. The statute giving such power is Section 4595, Compiled General Laws, 1927, which reads as follows:

"Any constable of the county in which the process issued may serve process of the county judge's courts and justice of the peace courts in any district of said county where the same may be lawfully served: Provided, he shall not be entitled to greater mileage in any case in serving writs from courts of justices of the peace than he would be if the writ issued from such court in the district in which such constable resides and for which he was elected."

Section 8323, Compiled General Laws, 1927, also makes it lawful for a constable to arrest and take into custody without a warrant any person who in the presence of the constable violates any of the penal laws of Florida or of any municipality, and the statute states that it shall be the duty of such constable to arrest without warrant and take into custody any person whom he has reasonable ground to believe and does believe has committed any felony, or whom he finds in the act of committing any felony or about to commit any felony, or engage in a fight or other breach of the peace.

In my opinion the power of the constable to make arrests under this section extends throughout his county, and is not limited to the constable's own district.

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May 6, 1942.—042-220.

CONSTABLES—TERRITORIAL JURISDICTION

QUESTION: (1) Can a constable go outside of his district or county to apprehend or return a prisoner?

(2) Can he go outside of the State to apprehend or return a prisoner?

(3) In either case (1) or (2) above, how does he bill and charge the county for mileage?

To Hon. G. A. Worley, State Attorney, Miami, Florida:

Answering first question:

A constable can go outside of his district or county to apprehend or return a prisoner in the following cases:

(a) He may serve process issuing out of county judge's or justice of the peace courts anywhere in the county in which his district is located.

(b) In hot pursuit he may follow an accused or one in process of being arrested, until apprehending his charge, anywhere in the State.

(c) Having arrested a prisoner upon a warrant sent to him from an issuing district or county other than his own, the constable may return the person arrested to the magistrate or judge who issued the warrant. In these cases, however, where a constable arrests a prisoner upon a warrant issued outside of and coming from a source outside of his county, the better and customary practice has been for the arresting officer of the Court issuing the warrant, to come to the place of detention in the county of arrest where the prisoner has been placed, to get the prisoner and return him or her to the issuing county.

If the prisoner is not entitled to make bail, or does not forthwith furnish bail in this third class of cases, a constable would ordinarily be the officer used to return the prisoner to the authority issuing the warrant only in cases originating from a justice of the peace court.

In the exercise of the authority possessed by county commissioners in the several counties to approve and pass upon the bills of constables, and in order that the county issuing the warrant might pay its moneys only to its own arresting officers for apprehending, arresting, and returning to charging county; it would seem that constables of the justice of the peace court issuing a warrant could be required to return their own prisoners not arrested in hot pursuit, from asylum counties within the State. (That is *return them*, as distinguished from *arresting them*.) The doing of this that is, requiring constables to return their own prisoners from asylum counties within the State, involves a trilateral policy in the matter of arresting and returning prisoners outside of the constable's county, to-wit:

First, the policy of sending the warrant to the county where the accused is, for service by an arresting officer of that county. This is compulsory in all cases except when the accused is being hotly pursued.

Second, the policy of the constable making the arrest on a warrant coming from another county, delivering his prisoner to his own jail for asylum, until the sheriff or constable of the county or district issuing the warrant shall come to return the prisoner to the proper warrant confinement place. (The making of an arrest upon such a warrant has to be

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done by the constable or sheriff of the county where the prisoner is to be found, but whether or not the officer making the arrest holds the prisoner for the arresting officer of the county issuing the warrant, is a matter of policy and is not compulsory either way.)

Third, the policy of county commissioners allowing the return of a prisoner to the warrant issuing source, by an officer of another county instead of one of its own county constables, the possibility of excess fee collections by their own constables being affected and curtailed if the asylum county or arresting county constable is allowed to return the prisoner to the county issuing the warrant.

Because of the matters and things heretofore pointed out and discussed, and inasmuch as a person arrested has the right to make bail at the place where arrested, if his case presents a bailable offense (Ex Parte Hatcher, 86 Fla. 330, 98 So. 72), and since a constable is not permitted to charge constructive mileage and could not do so in cases where he goes to return a prisoner who had been arrested in a county other than his own, where such prisoner is released on bond in the county of his arrest; the determination of definite policies for their constables to follow in arresting, apprehending, returning, and receiving persons and prisoners charged with crime, becomes important to the counties and to the constables, as the arresting officers.

Answering second question:

A constable stands upon the same footing as any other agent authorized by the Governor in the power possessed for going outside of the State to apprehend and return a Florida prisoner. He, of course, has no authority by virtue of his office of constable outside of the State, and such authority as he acquires in serving request for extradition from this State in another State comes by virtue of the provisions of Section 22 of Chapter 20460, Laws of Florida, Acts of 1941, in which it is provided that "whenever the Governor of this State shall demand a person charged with crime, etc., from the executive authority of any other State, etc., he shall issue a warrant under the seal of this State to some agent, commanding him to receive the person so charged if delivered to him, and convey him to the proper officer of the county in this State in which the offense was committed."

A constable, therefore, to be able to go outside of the State to apprehend or return a prisoner, must go as an agent of the Governor. The question of whether or not the constable may seek from the Governor requisition for extradition of a prisoner in another State is answered by Section 23 of Chapter 20460, supra. I hold that he comes within the term or word "bailiff" used in this Section 23, and may present to the Governor his written application for a requisition; provided, however, that his application so presented must be accompanied by the affidavit or certificate of his prosecuting attorney in his county, to the effect that the ends of justice require the arrest and return of the person for whom such extradition is being sought.

This latter applies in cases where extradition is being sought for one who is accused of crime. It does not apply in cases where requisition for extradition is being presented against one that has been convicted of a crime in this State and escaped to another State. A constable is not vested by the statute with any authority in this latter class of cases.

Answering third question:

Constables' fee bills under the provisions of Section 2899, Revised General Statutes, 4597, Compiled General Laws, Permanent Supplement, being Section 4, Chapter 3106, Acts of 1879, as amended by Section 1 of

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Chapter 14673, Acts of 1931, are those set forth in Section 4588, Compiled General Laws, (Sec. 2891, Revised General Statutes) as compensation for sheriffs, and apply and are chargeable by constables, because of the provision of the above referred to 1931 Act, where the Legislature states that "the fees of constables shall be the same as are at this time allowed sheriffs for like services."

There is very little difference between the fees provided for in Section 4588, Compiled General Laws, (Sec. 2891, Revised General Statutes) being Section 1 of Chapter 10091, Acts of 1925, and the 1941 Amendment to this last referred to Act. This 1941 Amendment contains a new schedule of fees for sheriffs. See in support of this holding, *Williams v. State*, 100 Fla. 1567, 125 So. 358, same case on rehearing, 100 Fla. 1570, 131 So. 864.

I interpret the mileage charge allowable to a constable to be as follows:

"Mileage distance to be estimated from the court house door to point of execution of process, per mile, each way, $12\frac{1}{2}\text{¢}$." this means $12\frac{1}{2}\text{¢}$ per mile for the constable going and returning, when making an arrest himself.

"Removal of prisoner to or from jail, per mile, each way, $12\frac{1}{2}\text{¢}$." I interpret this to mean a mileage of $12\frac{1}{2}\text{¢}$ going and returning for the constable when he goes to return a prisoner in asylum in another county of the State, or in another district of his county together, under the opinion of the Supreme Court of this state in *Traylor vs. State* Fla., 9 So. (2nd) 417, with a one way mileage for the prisoner.

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April 11, 1942.—042-169.

JUSTICES OF THE PEACE—ABOLISHMENT OF DISTRICT

QUESTION: Is the Board of County Commissioners of any county authorized to reduce the number of Justice of the Peace Districts in that county to two where such districts do not include all of the area of that county? This question applies particularly to Hillsborough County where there now are three Justice of the Peace Districts, one being the Plant City area, one being the Wimauma-Riverview area and the third covering the greater Tampa area?

To Hon. J. Rex Farrior, State Attorney, Tampa, Florida:

Article V, Section 21 of the Constitution of Florida provides:

"The County Commissioners of each county shall divide it into as many Justice districts, not less than two, as they may deem necessary. There shall be elected one justice of the peace for each of the said districts. He shall hold his office for four years."

Section 5210, Compiled General Laws, 1927, provides as follows:

"The Board of County Commissioners of each county shall divide their respective counties into as many Justice districts, not less than two, as they may deem necessary, and as near as practicable the limits of said districts shall be co-extensive with the limits of one or more election districts of the respective counties."

The provisions of the constitution and statute above quoted require that the whole of the county be embraced within two or more Justice of the Peace districts. The only direction vested in the County Commission-

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ers is to determine whether the whole of the county shall be included within the Constitutional minimum of two Justice precincts or whether the whole of the county shall be divided into a greater number of such districts.

Your attention is directed to the provision of Section 5212, Compiled General Laws 1927, wherein it is in substance provided that where there exists in a county a Justice of the Peace district for which there is no elected, qualified or commissioned Justice of the Peace, the County Commissioners of such county shall attach the territory of such Justice of the Peace district to the territory of some adjacent Justice of the Peace district which has a Justice of the Peace.

The applicable provisions of the Constitution and statutes of this State contemplate that the citizenry of each section of a county shall be included within, and have access to, the jurisdiction of the Justice of the Peace district.

Your attention is directed to the opinion of the Supreme Court of Florida in the case of *Conyers vs. State*, 123 So. 817 (text 818), wherein the court held:

"The office of the Justice of the Peace is a constitutional office and the incumbent of such office is a constitutional officer. When a Justice of the Peace has been elected and qualified to serve in any district, his office cannot be abolished during the term for which he has been elected."

Should the County Commissioners of Hillsborough County desire to abolish one of the three Justice of the Peace districts referred to in your letter, and attach the territory within the district desired to be abolished to the territory of an adjacent Justice of the Peace district, such action could not become effective during the term of office for which the Justice of the Peace in the affected district had been elected.

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August 27, 1942.—042-425.

JUSTICES OF THE PEACE—CRIMINAL JURISDICTION

QUESTION: Do justices of the peace in any of the counties of the state having a population of less than 50,000 according to the last preceding state census have any criminal trial jurisdiction?

To Hon. Bryan Willis, State Auditor:

This question must be determined from a construction of the provisions of Florida Statutes, 1941, which seems to have changed existing laws slightly. Where a general revision of the laws has been made by the re-enactment of them into a general statute any change made in such re-enactment becomes the law, although prior laws may be looked to in case construction of such statutes become necessary. Where the language of such revision is plain and unambiguous it must be construed without resort to the original statutes. (*Inman v. Davis*, 124 Fla. 298, 169 So. 741, 59 C.J. 1098, § 648). When sections 36.01, Florida Statutes, 1941, which provides the jurisdiction of county judges and sections 37.01 and 37.02, Florida Statutes, 1941, which provide the jurisdiction of justices of the peace, are construed together, we find no provision giving trial jurisdiction in criminal cases to justices of the peace in any county having a population of 50,000 or less according to the last preceding state census. Although this may be a change from the existing jurisdiction prior to the adoption of the Florida Statutes, 1941, the provisions of such new statute seem too clear to admit of any other construction.

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I do not think that the adoption of the Florida Statutes, 1941, effected any change in the status of the jurisdiction being exercised by justices of the peace under Chapters 18,003, 19,264, 19,348, 19,426, 19,459 and 19,560, Laws of Florida, Acts of 1939, and Chapter 20,655, Laws of Florida, Acts of 1941, as such laws seem to be local in their nature and were not affected by the adoption of the Florida Statutes, 1941, if in fact they were local laws; however, this office does not feel that it is necessary for it to pass upon the constitutionality of the above acts.

COURTS OF JUSTICES OF THE PEACE

February 10, 1941.—041-52.

JUSTICES OF THE PEACE—FEES

QUESTION: To what fees are Justices of the Peace entitled?

To Hon. George M. Moore, Justice of the Peace, Titusville, Florida:

Section 5237 Compiled General Laws provides that: "The fees of a Justice of the Peace shall be the same as those of the Clerk of the Circuit Court for similar services."

The Florida Supreme Court, in *State, ex rel. Murphy v. Harllee*, 100 Fla. 1562, 131 So. 866, held that this section was in effect as to justices of the peace being the same as Section 3084 of Revised General Statutes, even though it had been amended as to Clerks of the Circuit Court.

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August 27, 1942.—042-437.

JUSTICES OF THE PEACE—FEES

QUESTION: Are the fees of Justices of the Peace under Section 81.26, Florida Statutes, 1941, determined by the schedule of fees set out in Section 28.24, Florida Statutes, 1941, or by some other schedule?

To Hon. Bryan Willis, State Auditor:

The Florida Statutes, 1941, was one enactment; and section 81.26 thereof refers to the fees "of the clerk of the circuit court for similar services" which are provided by section 28.24 of said statutes. Both sections being in the same general enactment of statutes, section 81.26 fixes fees of justices of the peace to "be the same as those of the clerk of the circuit court for similar services", meaning the fees that were allowed by the same general enactment and not by prior or subsequent statutes. (*State vs. Harllee*, 100 Fla. 1562, 131 So. 866). Therefore, the fees set out in section 28.24, Florida Statutes, 1941, are the fees referred to by section 81.26 of said Statutes.

COURTS OF JUSTICES OF THE PEACE

August 27, 1942.—042-423.

JUSTICES OF THE PEACE, COUNTY JUDGES—FEES AND PER DIEM

QUESTION: 1. Does the per diem for court attendance of clerks of the Circuit Courts, provided by Section 28.24, Florida Statutes, 1941, apply to county judges under Section 36.17 of said statutes, and to justices of the peace under Section 81.26 of said statutes, which sections of the statutes adopt by reference said Section 28.24, from which to determine fees?

JUDICIARY DEPARTMENT—Courts of Justices of the Peace

2. Do the county judges' fees set out in Sub-Section (3) of Section 36.17 apply to services in all matters in the county judges' courts or to matters in probate only?

To Hon. Bryan Willis, State Auditor:

1. The per diem allowed clerks of the circuit courts for court attendance by Section 28.24, Florida Statutes, 1941, is not made applicable to county judges, under Section 36.17 of said statutes, and to justices of the peace, under section 81.26 of said statutes. This was the holding of the Attorney General in an opinion rendered on June 19, 1939 (1939-1940 Report, Page 52) and no change having been made in the law in this respect by the adoption of the Florida Statutes, 1941, I see no reason to depart from that opinion. Furthermore, the county judges and justices of the peace when trying cases are not acting in a similar capacity as is the clerk of the circuit court in this connection.

2. The county judges' fees set out in sub-section (3) of Section 36.17 Florida Statutes, 1941, apply to services in all matters in the county judge's court insofar as applicable. There is no distinction made between probate matters and other matters in this connection by the Florida Statutes, 1941. Several of the stated fees are by their nature limited to probate and guardianship matters; however, other provisions may be applicable to other kinds of proceedings. Where these fees are applicable similar fees under Section 28.24, Florida Statutes, 1941, would not apply.

COURTS OF JUSTICES OF THE PEACE

May 8, 1942.—042-230.

JUSTICES OF THE PEACE—FEES—DISCHARGE OF ACCUSED ON PRELIMINARY HEARING

QUESTION: (a) Where a Justice of the Peace holds a preliminary hearing, to determine whether the accused should be held for trial in either the Circuit Court or the County Court, but discharges him for lack of evidence, is he entitled to compensation; and

(b) If he is not entitled to compensation from the County, then is it legal for him to require a deposit for costs by the complaining witness and retain it when the accused is discharged for lack of evidence?

To Hon. Orion C. Parker, Jr., State Attorney, Tallahassee, Fla.:

Had the Justice of the Peace held the accused for trial in either the Circuit Court or County Court and no information was filed nor indictment found, the Justice of the Peace would not be entitled to compensation under and by virtue of Section 8488, Compiled General Laws, 1927. Only the costs for executing the warrant would be payable under this section.

A former Attorney General, on September 11, 1934 (1933-1934 Report, page 255) held that Justices of the Peace and County Judges were not entitled to compensation from the county when the accused is discharged on preliminary hearing. It is evident that the purpose and intent of Section 8488, supra, was to prevent the running up of a fee bill by a committing magistrate through wrongful arrests and binding over for trial. If the committing magistrate be allowed to cause the arrest of a person and then discharge him for want of sufficient evidence the same purpose would be accomplished. I, therefore, find no sufficient reason to depart from the opinion of my predecessor in office.

The Supreme Court of Florida in the case of Osceola County vs. State, 114 Fla. 875, 155 So. 119, expressly held that the provisions of

JUDICIARY DEPARTMENT—Courts of Justices of the Peace

Section 8490, Compiled General Laws 1927, have no applicability to crimes of a public nature. If said section has no applicability to a crime of a public nature, then the provisions of said section for requiring the complaining witness to advance costs must be confined only to those directly affecting the complaining witness. In the same case the Court held that a felony must be considered a crime of a public nature. This of itself limits the application to misdemeanors affecting the complaining witness. I am, therefore, of the opinion that a Justice of the Peace can only require a deposit for costs by the complaining witness in such crimes as are not considered of a public nature. In this connection a former Attorney General, on February 11, 1935 (1935-1936 Report, page 260) held that the proper procedure would be for the committing magistrate to turn over to the County all such costs paid in advance or a sufficient amount of said payment to cover all costs in the case and then bill the County for payments to him as in other cases. I likewise see no sufficient reason to depart from this rule.

COURTS OF JUSTICES OF THE PEACE

February 10, 1941.—041-61.

JUSTICES OF THE PEACE—FEES—HOLDING PRELIMINARY HEARING

QUESTION: (1) Is there a provision of law in this State providing that a justice of the peace is entitled to a fee for holding a preliminary hearing in either a felony or misdemeanor case other than the statutory fees allowed for issuance of affidavit, warrant, subpoenas, etc., as allowed the Clerk of the Circuit Court for similar services?

(2) Under Section 8536, Compiled General Laws, is a coroner entitled to the three dollar fee for issuing a death certificate, where a coroner's jury is summoned?

To Hon. E. C. Johnston, Justice of the Peace, Gainesville, Florida:

(1) Inasmuch as justices of the peace were not entitled to fees under the common law, no fees can be charged unless specifically provided for by statute.

Section 5237, Compiled General Laws, provides:

"The fees of a justice of the peace shall be the same as those of the clerk of the circuit court for similar services."

The Florida Supreme Court in *State ex rel. Murphy vs. Harlee*, 100 Fla. 1562, 131 So. 866, held that such fees were those created by Section 3084, Revised General Statutes, which section is set forth as a note to Section 5237, Compiled General Laws. In the schedule set forth in that section, there is no item referring to holding a preliminary hearing as you mention in your letter.

It is therefore my opinion, since no other statute has been found allowing a justice of the peace to charge a fee for such a service, that such a fee cannot be charged. It may be mentioned in this connection that Section 5237(1) and Section 5237(2), Compiled General Laws, Supplement, provide for fees for "Attendance, preliminary hearing or trial," but these statutes are applicable only to counties having a population of more than 100,000, and hence are not applicable to Alachua County.

(2) A coroner may charge only such fees as are permitted by a statute. Section 8536, Compiled General Laws, provides for a fee of

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three dollars for viewing a dead body and issuing a death certificate, where a coroner's jury is not summoned, and where the deceased was not attended by a physician in the last illness, but there is no provision for charging a fee for issuing a death certificate where those conditions are not fulfilled, as, for instance, where a coroner's jury is summoned. This section was clearly explained by the Florida Supreme Court in the very recent case of *State ex rel. Mahon vs. Cary*, 196 So. 694, where the court said:

"Section 8536, *supra*, provides the compensation for judicial officers when acting as coroners and that section clearly contemplates two different courses of procedure. For viewing the body and issuing death certificate only, he is entitled to \$3 and the mileage designated. But where the coroner finds it necessary to summons a jury then for summoning the jury, holding an inquest and making return thereon, he is allowed the same fees as are provided by law for sheriffs, clerks of the circuit court for similar services and \$5 per day and twenty-five cents per one-hundred words of testimony actually taken, reported and filed in the office of the clerk of the circuit court."

I have not found any statute providing for the charging of a fee for the issuance of a death certificate by a coroner, where a coroner's jury is summoned, and therefore it is my opinion that under such circumstances a fee cannot be charged.

COURTS OF JUSTICES OF THE PEACE

June 11, 1941.—041-325.

JUSTICES OF THE PEACE—JURISDICTION OF MISDEMEANORS

QUESTION: Chapter 18002, Laws of 1937, restricted misdemeanor trial jurisdiction to certain county judges in counties under 50,000 population. Chapter 19459, Acts of 1939, restored misdemeanor trial jurisdiction to Justices of the Peace in counties having a population of from 14,500 to 15,000, according to the last State census. Is such Act a general or local law and is it constitutional?

To Hon. M. L. Calvin, Justice of the Peace, Melbourne, Florida:

The Florida Supreme Court in *State vs. Ferrell*, 130 Fla. 26, 177 So. 181, and *State vs. Leon County*, 133 Fla. 68, 182 So. 639, held that Chapter 18002 was valid as a general law even though not applicable to counties having a population of 50,000 or more. Article III, Section 20, of the State Constitution prohibits the Legislature from passing any special or local law regulating the jurisdiction of any class of officers. The Supreme Court has frequently held invalid as local laws population acts applicable to counties within a population range as narrow as 500, which is the range of Chapter 19459, Acts of 1939. Until the Supreme Court or other court of competent jurisdiction has held a population act to be invalid as a local law such act is presumed to be valid and should be regarded as operative.

COURTS OF JUSTICES OF THE PEACE

March 21, 1941.—041-155.

JUSTICES OF THE PEACE—JURISDICTION OF MISDEMEANORS

QUESTION: Is a Justice of the Peace in Levy County within his jurisdiction in trying misdemeanors in accordance with Section 8289,

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Compiled General Laws of Florida, 1927, if there is a county judge's court but no county court or criminal court of record?

To Hon. James M. English, Justice of the Peace, Williston, Florida:

Section 8289, C. G. L., 1927, was amended by Chapter 18002, Acts of 1937, which reads as follows:

"Section 1. That Section 5995, Revised General Statutes of Florida, 1920, same being Section 8289, Compiled General Laws of Florida, 1927, be and it is hereby amended to read as follows:

'In counties where there are no County Courts or Criminal Courts of Record, the County Judges shall have power to hold a court to try and determine all misdemeanors committed in their respective counties, punishable by fine not exceeding Five Hundred (\$500.00) Dollars or by imprisonment not exceeding six (6) months, or by both such fine and imprisonment.'

"Section 2. Nothing contained in this Act shall be construed to in any wise affect the present criminal jurisdiction of Justices of the Peace in any county of the State of Florida having a population of over 50,000 according to the last preceding State census.

"Section 3. That all proceedings or cases now pending in the Justice of the Peace Courts shall not be affected by the provisions of this Act."

Levy County, of course, had a population of less than 50,000, according to the State census of 1935, and so the 1937 amendment, assuming it to be valid, is in force in your county. This 1937 Act has the effect of transferring the trial jurisdiction of misdemeanors, from the Justices of the Peace to the county judges in counties like yours under 50,000 population according to the last State census, where there are no county courts or criminal courts of record, and when such misdemeanors are punishable by a fine not exceeding \$500 or by imprisonment not exceeding six months, or by both fine and imprisonment.

The practical effect of this Act is to eliminate the criminal trial jurisdiction of Justices of the Peace in such counties.

The matters contained in this letter conform with the opinion rendered by my predecessor on June 26, 1937, which opinion is reported in the 1937-1938 Biennial Report of the Attorney General, Page 70.

COURTS OF JUSTICES OF THE PEACE

April 15th, 1941.—041-196.

JUSTICES OF THE PEACE—TRIAL JURISDICTION

QUESTION: Do Justices of the Peace have trial jurisdiction of criminal cases where fine does not exceed \$100.00 or imprisonment does not exceed three months?

To Hon. J. LeRoy Smith, Justice of the Peace, District No. 1, Dade City, Florida:

While Chapter 18002 of the Acts of 1937 takes away the entire criminal trial jurisdiction of the Justice of the Peace in counties where there are no county courts or criminal courts of record, it does not repeal Section 5996 Revised General Statutes (Sec. 8290, C. G. L.) which states that in counties where there are county courts, justices

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of the peace shall have power to hold a court to try and determine all misdemeanors committed in their respective districts, punishable by fine not exceeding \$100.00 or imprisonment not exceeding three months or by both such fine and imprisonment.

The punishment provided by Section 7793 C. G. L. comes within the jurisdiction of the Justice of the Peace in any county where there is a county court. In Pasco County, which has a county court, you as Justice of the Peace, would have jurisdiction of a charge under Section 7793 C. G. L.

JURORS AND JURY LISTS

May 22, 1941.—041-282.

JURORS—FEES OF CLERKS—PAYMENT

QUESTION: Are the clerks of the various courts entitled to any compensation for services rendered in connection with Section 4482, Compiled General Laws, 1927, and, if so, would such compensation be governed by Section 4867, Compiled General Laws, 1927?

To Hon. W. M. Wainwright, State Auditor:

I call your attention to the fact that Section 4482, Compiled General Laws, 1927, is Paragraph 4 of Chapter 4121, Acts of 1893, which was an Act relating to the obtaining of money for the payment of jurors and witnesses in behalf of the State.

I also call your attention to Section 4867, Compiled General Laws, which provides for the basis upon which fees may be charged by the clerks of the court.

I do not find anything in said Section 4867 which covers moneys disbursed by the clerk of the court pursuant to Section 4482, *supra*. The only schedule in Section 4867, *supra*, which might purport to cover moneys disbursed under Section 4482, is the schedule: "Moneys, receiving into registry and paying out * * * " This, in my opinion, has reference to moneys paid into the registry of the court, and moneys transmitted to the clerk of the court pursuant to the provisions of Chapter 4121, *supra*, does not constitute moneys received into the registry.

It is my opinion, therefore, that the clerks of the various courts are not entitled to any compensation for services rendered in connection with Section 4482, Compiled General Laws, 1927.

JURORS AND JURY LISTS

August 4, 1942.—042-378.

JURORS—FEES—WHEN EXCUSED

QUESTION: When a person is subpoenaed for jury duty and notified to appear on a certain date and does appear in the Judge's Chambers prior to the convening of court and requests the Judge to excuse him from jury duty, and the Judge does excuse him from jury duty, and the Judge does so prior to the convening of court, is such person entitled to receive the per diem and mileage fees allowed by statutes to be paid to jurors? In this case the person summoned for jury duty never actually served on a jury, having been excused prior to the convening of court as above stated.

JUDICIARY DEPARTMENT—Jurors and Jury Lists

To Hon. J. M. Lee, Comptroller:

Section 40.24, Florida Statutes, 1941, fixes the compensation of jurors and in so doing it provides:

"Grand and petit jurors are the regular panel and jurors *summoned* to complete a jury after the regular panel is exhausted . . . shall receive for each day of active attendance upon the court, \$3.00 . . . In addition to the compensation above provided, all jurors shall receive five cents per mile for every mile necessarily traveled in going to and returning from court by the nearest practicable route."

You will note that this section of our statute contemplates that whenever a juror is summoned and travels the necessary mileage, that he is entitled to be paid regardless of whether or not he actually serves. The idea being to compensate him for expenses in attending court and even though, in this instance, the juror did not actually serve, it was necessary for him to travel to the courthouse and to report to the judge. I think it immaterial that the judge excused him in chambers rather than when he was actually occupying the bench, and, although the juror did not serve a complete day, the statute provides—

"All fractional parts of a day shall be counted as a day."

I am, therefore, of the opinion that a juror who has been lawfully summoned but who is excused by the judge prior to the convening of court, would be entitled to receive per diem and mileage.

CHAPTER V

CIVIL PRACTICE AND PROCEDURE

LEGAL AND OFFICIAL ADVERTISEMENTS

February 6, 1941.—041-38.

LEGAL ADVERTISEMENT—PUBLICATION OF NOTICES

QUESTION: (1) Is the publication of a legal advertisement (presumed to be within the purview of Chapter 14830, Acts 1931) on January 8, 1941, legal if newspaper was entered as second class mail matter on May 9, 1940?

(2) May a newspaper, which was entered as second class mail matter on May 9, 1940, be selected by the County Commissioners, on February 11, 1941, as the newspaper in which to publish notice of the sale of lands for the unpaid taxes for 1940?

(3) May the County Commissioners, in selecting a newspaper in which to publish the notice of sale of lands for unpaid taxes, receive competitive bids as to newspaper charges for the publication of such tax list and enter into contracts with publishers pursuant thereto?

To Mr. John C. Winslett, Editor, The Jackson County Floridan, Marianna, Florida:

(1) I presume that when you speak of newspaper, you mean daily or weekly publication reporting news of local or foreign interest, or both, intended for the general reading public. This being the definition given by our Supreme Court in the cases of *State ex rel. Yaeger, et al., vs. Rose*, 93 Fla. 1018, 114 So. 373; *Culclasure vs. Consolidated Bond & Mortgage Co., et al.*, 94 Fla. 764, 114 So. 540. The holdings in these cases, of course, relate to publication in a newspaper in order to obtain constructive service under Section 4895, Compiled General Laws, 1927.

The statutes and laws applicable and which must be considered in answering the above questions are:

Section 969 C. G. L. (756 R. G. S.) as amended by Section 3, Chapter 14572, Acts 1929, insofar as applicable, provides that the County Commissioners of the county "at their first regular meeting in February of each year" shall select a newspaper within which to publish the advertisement of the delinquent tax list "and the newspaper so selected shall have been continuously published in the county for a period of not less than one year prior to its selection." This section further provides that "the newspaper charges for advertising shall be fifteen cents per line for the four insertions, per single column," but no charge shall be made for the head notice.

Chapter 14830, Acts of 1931, insofar as applicable provides as follows:

(a) "No notice or publication required to be published in a newspaper . . . of sale of property, real or personal, for taxes . . . or any other publication or notice pertaining to the affairs of the State or any county, municipality or other political subdivision thereof, shall be

**CIVIL PRACTICE AND PROCEDURE—Legal and Official
Advertisements**

deemed to have been published in accordance with the statutes providing for such publication unless the same shall have been published for the prescribed period of time required for such publication, in a newspaper which, at the time of such publication, shall have been continuously published at least once each week and shall have been entered as second class mail matter at a post office in the county where published for a period of one year next preceding the first insertion of such publication."

(b) It is further provided in said Act that no legal publication of any kind, nature or description, as defined above, shall be valid or binding or held to be in compliance with the statutes providing for such publication, unless the same shall have been published in accordance with the provisions of Chapter 14830, Acts 1931.

If a newspaper had not been entered as second class matter for one year prior to the publication of a legal notice embraced in Chapter 14830, Acts 1931, the publication would seem to be illegal under Section 2 of said Chapter, although the newspaper might have been published for more than one year. If it had not been published for one year, then it would also be illegal for that reason. This seems to answer the first question.

On first reading it might appear that the provisions of the taxing laws as amended in 1929 were in conflict with the provisions of the 1931 Act and were, therefore, repealed by Section 4 of said 1931 Act, which repealed "all laws and parts of laws in conflict with" said Act. But upon further thought it seems to me that statutes regarding the selection of a newspaper are not necessarily in conflict with statutes regarding the publication of the actual notice. Therefore, it is my view that County Commissioners are required to select a newspaper, which at the time of selection, has been published once each week for more than one year and that the newspaper, at the time of the first insertion of the publication, must also be qualified under the 1931 Act, which not only requires its publication once each week for a period of one year, but that it shall have been entered as second class mail matter for a period of one year prior to said publication. To hold that the 1931 law is in conflict with the provisions of the 1929 law regarding selection of newspapers, we would be forced to hold that the selection of a newspaper by County Commissioners for the purpose of publishing a tax list was so closely connected with the publication of the tax list itself as to be practically one and the same thing. It seems to me that the selection of a newspaper and the publication of the notice are entirely separate matters. Furthermore, the Supreme Court, in the case of *Townsend vs. Brown*, 69 Fla. 155, 67 So. 869, held that the requirement as to selection of newspapers for publication of tax lists was merely directory and not mandatory and if the selection was not made in February it might later be made. It has also been held that after a selection of a newspaper that the County Commissioners might reconsider the question and redesignate (See *Parker vs. Evening News Publishing Co.*, 54 Fla. 544, 45 So. 309, and *Bowden vs. Ricker*, 70 Fla. 154; 69 So. 694).

(2) The proper answer to the second question would be that the County Commissioners might select any newspaper, at their meeting in February, for the publication of the delinquent tax list, provided said paper had been published as required by law for more than one year, although it had not been entered as second class matter for a full year, provided that it will have been entered as second class matter for a year at the date of the first publication of the notice.

(3) The third question on first reading appears to exclude any possibility of receiving bids for the publication, as the compensation

CIVIL PRACTICE AND PROCEDURE—Legal and Official Advertisements

for the publication is definitely stated at fifteen cents per line, etc. If the amount to be paid is definitely determined by law, then I see no reason or basis for asking for bids and if a newspaper selected by the County Commissioners was not willing to publish the advertisement for the compensation allowed by the State it could only refuse the offer. I see no basis for asking for bids unless I construe the statute as setting a maximum amount and allowing the County Commissioners to make a contract at a less figure. Even if I construe the statute as fixing a maximum compensation and not as fixing the compensation itself, it seems that the County Commissioners should receive bids making them returnable the day of selection of newspaper. There would seem to be no reason for receiving bids after selection. The statute fixes the compensation for advertising in the following words: "The newspaper charges for advertising *shall* be fifteen cents per line for the four insertions, per single column," which seems definite. To read into that provision that the advertisement shall be *not more than* fifteen cents per line would seem to go beyond the usual rules of construction of statutes. This seems to be supported by an expression in *Parker vs. Evening News Publishing Co.*, 54 Fla. 544, 45 So. 309, text 310, where the court said:

"The rates to be paid and method of payment are fixed by law."
It therefore seems that the third question should be answered in the negative.

The County Commissioners do not seem to lose their connection with the matter when they designate a newspaper and if there should be need of further consideration and even of a redesignation, the same may be made by them. See *Parker vs. Evening News Publishing Co.*, supra, and *Bowden vs. Ricker*, 70 Fla. 154, 69 So. 694. The designation of the newspaper does not amount to a contract with the designated paper. See above cases.

LEGAL AND OFFICIAL ADVERTISEMENTS

May 27, 1942.—042-258.

LEGAL ADVERTISEMENTS—RATES

QUESTION: May newspapers charge different rates for legal advertising than those set forth as fifty cents per square inch for the first insertion and twenty-five cents per square inch for each subsequent insertion in Chapter 20264, Acts of 1941?

To Hon. E. W. Scarborough, Director, State Beverage Department:

Sub-Section 3 of Chapter 20264, Acts of 1941, provides:

"Where the regular established minimum commercial rate per square inch of the newspaper publishing such official public notices or legal advertisements is in excess of the rate herein stipulated, said minimum commercial rate per square inch may be charged for all such legal advertisements or official public notices for each insertion, including notices of all governmental bodies or agencies."

Obviously, from the above, the rate can be different because of Sub-Section 3 of Section 1.

CIVIL PRACTICE AND PROCEDURE—Divorce, Alimony and Custody of Children**DIVORCE, ALIMONY AND CUSTODY OF CHILDREN**

February 14, 1941.—041-72.

MILITARY SERVICE—SUSPENSION OF ALIMONY PAYMENTS

QUESTION: Will alimony payments be suspended if the man is inducted into military service?

To Mr. Ellis F. Davis, Attorney-at-Law, Kissimmee, Florida:

I call your attention to the Soldiers' and Sailors' Civil Relief Act of 1940, particularly to Section 201, which provides:

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during a period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some persons on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of the plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

I also call your attention to Section 203 of said Act which provides:

"In any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the court may, in its discretion, on its own motion, or on application to it by such person or some persons on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his military service—stay the execution of any judgment or order entered against such person, as provided in this Act."

Under the Constitution the Federal Government is expressly granted the power to maintain an army and navy and, therefore, Congress may prescribe conditions under which persons in military service of the United States shall be subject to process of the courts.

It is my opinion, therefore, that the power to grant a stay of proceedings, such as the postponement of alimony payments wherein a person in military service is involved, is largely within the discretion of the court. I do not mean by this that there is an automatic suspension or postponement as to civil obligations during military service, but only that the parties in the military service may apply to the court to stay all proceedings for the enforcement of a civil obligation.

EMINENT DOMAIN

June 6, 1941.—041-315.

AUTHORITY—BROWARD COUNTY PORT AUTHORITY

QUESTION: Has the Broward County Port Authority the right to condemn privately-owned property so that the same could be sold to certain oil companies for tank farms which would contribute to the further growth of Port Everglades? The Port Authority does not contend that the land to be condemned is necessary for the purposes of the Port District?

CIVIL PRACTICE AND PROCEDURE—Eminent Domain

To Mr. R. R. Sanders, Attorney for Broward County Port Authority, Fort Lauderdale, Florida:

Chapter 17506, Special Acts of 1935, as amended by Chapter 18442, Special Acts of 1937, provides that the Port Authority may acquire by grant, purchase, gift, devise, condemnation * * * all property, real or personal * * * within the said Port District which the Port Authority shall determine to be *necessary for the purposes of said Port District*.

In view of the fact it is admitted that the land would be condemned, not for purposes necessary to the district, but for the betterment of the town of Port Everglades, the Broward County Port Authority has no right to institute condemnation proceedings for any such reason.

EMINENT DOMAIN

August 19, 1941.—041-460.

PROCEDURE—FLORIDA BOARD OF FORESTRY AND PARKS

QUESTION: What is the correct chronological procedure to be followed by the Florida Board of Forestry and Parks in eminent domain proceedings?

To Hon. H. J. Malsberger, State Forester, Florida Forest and Park Service:

The 1941 Legislature enacted two acts relating to eminent domain—Chapters 20304 and 20930. Chapter 20304 relates to eminent domain proceedings instituted by counties of the State and other bodies while Chapter 20930 makes uniform the general proceedings in eminent domain. The Florida Board of Forestry and Parks may institute such proceedings under these chapters.

Chapter 20900, Acts of 1941, provides that the Florida Board of Forestry (the name of which was changed by Chapter 20419 to "Florida Board of Forestry and Parks") may acquire private property for State parks, State forests or rights-of-way for State park or State forest roads and for exercising other authorized powers and duties, in the manner provided by law for the condemnation of private property by counties.

Under Chapter 20930, the board would file a verified petition in the Circuit Court of the county in which the property sought to be condemned lies, setting forth various matters which are described in Section 1 of that Act. Upon the filing of a petition, the Clerk of the Circuit Court issues a notice to the defendants named in the petition and all others concerned, to appear in the court on a day named in the notice not less than twenty-eight nor more than sixty days from the date thereof. If it appears that issues must be tried, the Judge of the Circuit Court is required to try the cause immediately; such as in the determination of the amounts to be awarded for the land condemned.

Under Chapter 20304 provision is made for the filing of a declaration of taking to be filed by the petitioner in the proceedings declaring that the lands are thereby taken for the use of the petitioner. This Chapter deals chiefly with the right to take possession and title in advance of final judgments in the proceedings.

In other words, the Florida Board of Forestry and Parks is empowered to institute condemnation proceedings, as above set forth under Chapter 20930 and if the board desires to take possession of the lands and title in advance of the final judgment, the board may undertake the proceedings outlined in Chapter 20304.

CHAPTER VI

JUDICIAL PROOF

EVIDENCE

February 28, 1941.—041-92.

PHOTOGRAPHIC REPRODUCTIONS—ADMISSIBILITY

QUESTION: (1) May photographic (recordak) reproductions be admitted as evidence in place of original records which have been intentionally destroyed for the sole purpose of effecting good administration in the Unemployment Compensation Division of the Florida Industrial Commission?

(2) What is the necessity for statutory amendment clearly authorizing the admissibility of such photographic reproductions in Florida Courts?

To Florida Industrial Commission:

(1) The Legislature of this State has not as yet enacted legislation specifically authorizing the admission in evidence of photographic reproductions of original documents or records as primary evidence.

Insofar as such reproductions might be admissible as such evidence in any court of the United States and in any court established by Act of Congress, I am of the opinion that they would be admissible under 28 U. S. C. Section 695, 28 U. S. C. A. Section 695.

In this connection the United States Circuit Court of Appeals, 2nd Circuit, in the case of *United States vs. Manton* (1938) 107 Fed. 2d 834, 844, cited by you in your request for opinion made the following comments and ruling with reference to such reproductions:

"The Trial Court over objection admitted in evidence what are called recordak facsimiles of checks. The objection made to this ruling of the court is that such facsimiles do not constitute the best evidence. These recordaks are photostatic reproductions of the face of checks which have been paid; and they were offered as evidence of such payments. It is argued that the original checks themselves were the best evidence and that their absence should have been accounted for as a prerequisite to the admission of the recordaks. With this contention we cannot agree. These recordaks are made and kept among the records of many banks in due course of business and are within the words of 28 U. S. C. Section 695, 28 U. S. C. A. Section 695. Their accuracy is not questioned. They represent, in the course of a year, perhaps millions of transactions. No one at all familiar with bank routine would hesitate to accept them as practically conclusive evidence. As proof of payment, they constitute not secondary but primary evidence."

Unfortunately, we do not have a similar statute in this state, and therefore, the opinion in the *Manton* case, while persuasive, would not be a controlling authority were a similar question to be raised in our State Courts.

In the case of *Firestone Service Stores vs. Wynn*, 179 So. 175, 178, our Supreme Court has said:

JUDICIAL PROOF—Evidence

"Undoubtedly the best evidence of the contents of a written instrument consists in the actual production of the instrument itself, and the general rule is that secondary evidence of its contents cannot be admitted until the non-production of the original has been satisfactorily accounted for."

This decision and the rule announced by it brings up the question of what would constitute a satisfactory accounting for the non-production of the original record. Your problem contemplates an intentional and deliberate destruction of the original instruments or records (pay order cards).

In this connection we quote the following from Wigmore on Evidence, Vol. II, Page 1416:

"If it should appear that the party desiring to prove a document had himself destroyed it, with the object of preventing its production in court, the evidence of its contents, which he might then offer, could probably be regarded as in all likelihood false or misleading. It is with this extreme cause in mind that a few courts have inconsiderately laid down an unconditional rule that the proponent's intentional destruction of the document bars him from evidencing its contents in any other way.

"But it is obvious that there may be many cases of intentional destruction which do not present the above extreme features. The intentional destruction may clearly appear to have been natural and proper, or it may be merely open to the bare suspicion of fraudulent suppression; and in such cases the evidence of its contents should be received, subject to comment on the circumstances.

"The view now generally accepted is that (1) a destruction in the ordinary course of business, and, of course, a destruction by mistake, is sufficient to allow the contents to be shown as in other cases of loss, and that (2) a destruction otherwise made will equally suffice, provided the proponent first removes, to the satisfaction of the judge, any reasonable suspicion of fraud."

In other words, the cause or motive of the destruction is then the controlling fact which must determine the admissibility of evidence in such cases. The principal object of the rule appears to be the prevention of fraud. Where then the intentional destruction of original records is for the sole purpose of effecting good administration and is adopted as a regular routine in the ordinary course of administering the affairs of the office maintaining such records, the element of fraud would be removed and the circumstances, in my opinion, would constitute a satisfactory accounting for the non-production of the original records.

This view is supported by the following quotations from the Manton case, *supra*:

"But putting all this aside, the best evidence rule should not be pushed beyond the reason upon which it rests. It should be 'so applied,' as the Supreme Court held in an early case, 'as to promote the ends of justice, and guard against fraud or imposition.' *Renner vs. Bank of Columbia*, 9 Wheat. 581, 597, 6 L. Ed. 166. See also *United States vs. Reyburn*, 6 Pet. 352, 366, 8 L. Ed. 424; *Minor vs. Tillotson*, 7 Pet. 99, 100, 8 L. Ed. 621. The rule is not based upon the view that the so-called secondary evidence is not competent, since, if the best evidence is shown to be unobtainable, secondary evidence at once becomes admissible. And if it appears, as it does here, that what is

JUDICIAL PROOF—Evidence

called the secondary evidence is clearly equal in probative value to what is called the primary proof, and that fraud or imposition, reasonably, is not to be feared, the reason upon which the best evidence rule rests ceases, with the consequence that in that situation the rule itself must cease to be applicable, . . .

"An over-technical and strained application of the best evidence rule serves only to hamper the inquiry without at all advancing the cause of truth. 'The fundamental basis,' the Supreme Court has said, 'upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth.' Funk vs. U. S., 290 U. S. 371, 372, 381, 54 S. Ct. 212, 215, 78 L. Ed. 369."

The foregoing view is further supported by the following quotation from the opinion of the Supreme Court of Florida in the case of Neylans vs. Herndon, 84 So. 89, 90:

"If any suspicion hangs over a lost instrument, or that it is designedly withheld, a rigid inquiry should be made into the reasons of its nonproduction. But, where there is no such suspicion, all that should be required is reasonable diligence to obtain the original. The loss of it must be made out to the satisfaction of the court. The law exacts nothing unreasonable in such a case. If parole proof of the loss establishes the fact with reasonable certainty, or, as it is stated by some of the authorities, if the proof establishes a strong probability of its loss, then secondary evidence is admissible."

We likewise find support for this view in the following quotation from the opinion of the Supreme Court of Florida in case of Smith vs. State, 71 So. 915:

"While secondary evidence should not be admitted in substitution for primary evidence, yet where the evidence offered is primary or original in its character, it should not be excluded because there might have been introduced other primary evidence that is corroborative or stronger and more conclusive."

It is my opinion based upon the foregoing authorities that photographic (recordak) reproductions of original records as contemplated by your inquiry would be admissible as evidence where the original records have been intentionally destroyed for the sole purpose of effecting good administration in the Unemployment Compensation Division of your agency.

(2) Concerning the necessity for a statute or amendment clearly authorizing the admissibility of photographic reproduction of original records as evidence in Florida Courts, it is my opinion, as expressed above, that such reproductions would be admissible in the absence of such amendment. Nevertheless, any possible doubt or question would be removed by the enactment of such legislation and considerable time and effort might be conserved in affecting their admission in evidence. It is my opinion, therefore, that such an amendment or statute would be helpful, and to remove any possible question or doubt, it would be my recommendation that such an amendment or statute be sought in the Legislature.

CHAPTER VII

ELECTORS AND ELECTIONS

ELECTION SERVICES

June 11, 1942.—042-292.

COUNTY JUDGES—COMPENSATION

QUESTION: Are the county judges of the several counties of Florida entitled to compensation for the services required of them in connection with the holding of primary and general elections and the canvass of the returns of such elections?

To Hon. Bryan Willis, State Auditor:

Statutes relating to fees and compensation of public officers must be strictly construed in favor of the state or other governmental agency and such officers are entitled only to such fees as are clearly given them by law (46 C.J. 1019). When no compensation is provided by law for services required, the rendition of such services is deemed to be gratuitous (*Rawles vs. State*, 98 Fla. 103, 122 So. 222), and when the duties of a public officer are increased by the addition of other and additional duties germane to that office without provision being made for compensation for such additional services they must be performed without compensation (46 C.J. 1017).

On July 15, 1932 (1931-1932 Report page 584) the attorney general rendered an opinion wherein it was held that no statutory authority existed for the payment of compensation to the county judges for the taking of the oath of absentee voters and for other services under Section 436, Compiled General Laws, 1927. I find no reason for departing from that ruling.

I likewise find no statutory authority for the payment of compensation to the county judges for other services required of them in connection with the election laws. Therefore, I am of the opinion that the county judges of the several counties of Florida are entitled to no compensation or fees for the services required of them in connection with the holding of primary and general elections and the canvass of the returns of such elections; however, I am of the opinion that they are entitled to reimbursement for any and all sums of money put out by them as postage and special delivery fees in the mailing of absentee ballots as required by law. These expenses should be paid as other election expenses are paid.

BALLOTS

July 15, 1941.—041-387.

REQUIREMENTS—FIVE PERCENT—COMMUNIST PARTY

QUESTION: By what means is the Communist Party barred from the ballot in Florida?

To Hon. W. T. Cash, State Librarian, State Library Board:

The statutes which may have the effect of preventing the names of candidates of political parties having as members less than five per cent of the total registered electors of the State of Florida, from being

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printed on the official ballots in elections in the State, are "Section 1 of Chapter 14657, Acts of 1931 (Section 312, C. G. L. Supplement); and Sections 1 and 4 of Chapter 19663, Acts of 1939 (Sections 356 and 411, C. G. L., 1940 Supplement). A number of other laws relating to general and primary elections also have a bearing on this question. Under earlier and analogous statutes the Florida Supreme Court in the case of *State ex rel. Barnett vs. Gray*, 107 Fla. 73, 144 So. 349, held that certain candidates of the Communist Party were not entitled to have their names printed on the official ballot in the State of Florida at the general election in 1928. A thorough discussion of this question may be found in the opinion in that case.

BALLOTS

September 28, 1942.—042-464.

SECRETARY OF STATE—DUTIES UNDER FEDERAL LAWS

QUESTION: (1) Should the Secretary of State make any attempt to secure ballots that would contain the names of candidates for State and local office or in view of all of the circumstances, and late date, confine the ballot to the names of candidates for Federal office, in this case members of Congress? See Section 5 of the Act.

(2) If there is not sufficient State law, or lack of time in providing complete ballots, should the Secretary of State undertake to submit a ballot containing in addition to Federal offices the proposed constitutional amendments as these will be voted for in all precincts in the State?

(3) In view of the provisions of Section 4, sub-paragraph (b) of the Act of Congress with reference to the list of names, residence address, etc., being open to public inspection "not later than two weeks prior to the holding of the election" should the Secretary of State refrain from sending to the county boards the names of any of those in the military services requesting ballots later than two weeks prior to the general election; or does the final sentence in that sub-paragraph leave it open for further names to be added?

(4) Referring to Section 6 of the Act of Congress should an additional plain envelope be furnished to enclose the ballot and in turn to be enclosed in the printed envelope referred to in said Section so that the secrecy of the ballot as required by Florida Law shall be maintained?

(5) In view of Section 8 of the Act of Congress will it be the duty of the Secretary of State to transmit ballots received from those in the military services to the County Judge, or the Supervisor of Registration to be by them deposited in the ballot boxes before going out to the precincts in order that precinct inspectors and clerks may canvass the same or should the Secretary of State send them to the County Judge and/or Supervisor of Registration in order that they may be by the County Canvassing Board included in the county canvass?

To Hon. R. A. Gray, Secretary of State:

(1) I am of the opinion that ballots prepared by you should contain, for the coming election, only candidates for Representatives to Congress, there being no occasion for the printing of the names of other candidates covered by the Act.

My reasons for thus confining the ballot are that the names of all candidates for strictly State and county offices, and proposed consti-

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tutional amendments, will appear on our regular ballots, and our statutes provide for the manner in which absentee votes within the State may be cast. State laws are paramount and controlling. Electors within the State, therefore, whether in any of the armed forces or not, may cast an absentee ballot only in compliance with our State laws, the Congress having no authority to provide otherwise,—and, in fact, has made no such attempt by the Act in question.

(2) My answer to the first question covers this question.

(3) Answering your inquiry (3), I suggest the following for your consideration: Section 4 of the Act deals with (a) post cards when received by the Secretary of State, (b) a statement from the Secretary of State to the county registration official containing the names and addresses and other information appearing on the post card of the voter, (c) the statement to be prepared by the county registration official, contents being taken from the statement received by him from the Secretary of State, (d) the provision with respect to the county registration official's statement being kept open to public inspection, and being added to, and the number of copies of same to be made by the county registration official, and the mailing of a duplicate copy of same by the county registration official to the Secretary of State and the status of the duplicate statement when received by the Secretary of State from the county registration official with respect to public inspection in the Secretary of State's office, (e) the last language in Section 4 applies only to the statement from the county registration official, mailed to the Secretary of State, and kept in the Secretary of State's office, and provides that the Secretary of State shall make additions to such statement as received from county registration officials.

Paragraph (b) of Section 4 requires the Secretary of State to keep these statements open at all times to public inspection, which is in substance the same requirement with respect to their inspection in the office of the county registration official, except that the county registration official does not necessarily have to have them ready for public inspection until two weeks prior to the holding of the election. Your inquiry as to the meaning of this Section 4 is:

"Should I refrain from sending to the County Boards the names of any of those in the military service requesting ballots later than two weeks prior to the general election?"

In answer to which my opinion is that you should send these names in the form of a statement containing name, address and other information obtained from the post card, to the proper county registration official as and when received by you, except that you should not send the name in at a date when it would not be received until too late to count a ballot voted by such name. This time will appear later in this opinion. However, you do not place such names originally received from the voter by you on the list that is sent you by the county registration officer until that name has been returned to you on the county registration officer's duplicate list, as the list which you keep in your office of these voters is a duplicate list made and sent to you by each county registration officer, and you at no time should place the names received by you originally on the cards that come to your office from the voter, on these county registration officer's duplicate lists. You should not add to the county registration officer's list kept in your office except as additional lists come to you from such county registration officer and are received in your office.

In my opinion, the provision in Section 4, referring to the two weeks' time limit for public inspection in the county registration officer's

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office has nothing to do with the list of voters which you keep, nor the transmittal by you of lists to the county registration officers. You have not asked me for an opinion regarding what this provision, "not later than two weeks prior to the holding of the election" does bring into the Act, but on account of the importance of this list in the matter of determining who is listed to vote under this law, I am taking the liberty of stating that in my opinion this quoted provision requires the county registration officer to keep open to the public inspection the lists in his office at least two weeks prior to the holding of such election. In other words, the county registration officer under this quoted provision is supposed to open permanently his list of these voters to public inspection two weeks prior to the holding of an election, but, of course, he adds names on the list as received from you, even though received after he opened it to public inspection. This list in the county registration officer's custody should be the guide to the canvassing board in canvassing the ballots cast under this law. The votes offered should reconcile with this list as kept by the county registration officer to the extent of showing the voter's name and address and checking his right to vote by the presence of his name on such list.

(4) My view of the requirements of Section 6 is that you should furnish a plain envelope without any identifying mark thereon, in which the ballot of the voter is to be sealed, which plain envelope in turn should be enclosed in the official envelope containing the printed matter required. You should issue instructions to the voter covering this usage and requirement, the purpose of which, as suggested by you, would be "so that the secrecy of the ballot, as required by Florida law, would be maintained."

(5) Section 9 of the Act contemplates the casting of the ballot so voted up to the time of the closing of the polls; i.e., it must be canvassed if it is received by the county judge of the county prior to the hour of the closing of the polls.

The procedure outlined by Section 101.03, Florida Statutes, 1941, should be followed in the canvass of these ballots. The Federal Act requires the ballot to be sent to the Secretary of State and that the Secretary of State forward it to the appropriate county official. I consider the ballot to be cast when it is received by the county official, and, therefore, that in order for it to be entitled to be counted, it must be in the hands of the county judge prior to the closing of the polls which necessarily means that you should not forward any ballot to the county judge that cannot be delivered and received prior to such time.

The ballot when received by the county judge should be dealt with by him and the canvassing board, as provided in Section 101.03 for ballots of absentee voters.

I have no independent suggestions to offer except that it does not seem to me that this Federal law can be held to apply to Florida voters who are within the State of Florida since we already have a State law (Chapter 101, Florida Statutes, 1941) that provides for voting by such persons for both national and state candidates, and except further that instructions to voters contemplated by sub-section (b) of Section 6 of the Act should contain a reminder that if the voter has cast an absentee ballot within the State or has personally voted, he may not vote a war ballot. I would further comment to this extent that in studying this law the necessity for instructions to the voter under it appear in a number of places as necessary in order to fully acquaint them of the proper method for availing themselves of the voting privilege accorded under it, and the necessary state law which has to be conformed to in the exercise thereof.

ELECTORS AND ELECTIONS—Municipalities

MUNICIPALITIES

March 6, 1941.—041-115.

LAWS CONTROLLING—RESIDENCE

QUESTION: Can a municipality, by a provision of its charter, permit a person who has been a resident of the State for only thirty days to register and vote at its elections?

To Hon. J. M. Lee, Comptroller, Attention Mr. H. J. Chance, Assistant Comptroller:

In reply I wish to advise that Section 8 of Article VIII of our Constitution provides:

"The Legislature shall have power to establish, and to abolish, municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time . . ."

This particular provision should be a complete answer to your question. However, I find that the question you have propounded has arisen several times under Article VI, Section 1, which provides:

"Every male person of the age of twenty-one years and upwards that shall, at the time of registration, be a citizen of the United States, and that shall have resided and had his habitation, domicile, home and place of permanent abode in Florida for one year and in the county for six months, shall in such county be deemed a qualified elector at all elections under this Constitution . . ."

The first case considered by the Supreme Court that involved the question under consideration was that of *State ex rel. Lamar, Attorney General, v. Dillon, et al*, 14 So. 383. There the Court said:

"Section 1 of Article 6 of the constitution of 1885, prescribing the qualifications of electors at all elections under it, does not apply to elections for municipal officers in this state, but such elections are subject to statutory regulation; and it is competent for the legislature to prescribe the qualifications of voters at the same."

The next case considered by the Supreme Court was *West et al v. Town of Lake Placid*, 120 So. 361. There Mr. Justice Strum speaking for the Court said:

"The method and manner in which the right to vote shall be exercised in local municipal elections is peculiarly within the regulatory powers of the Legislature in view of article 8, sec. 8, of the Constitution, assigning the power to the Legislature 'to establish, and to abolish, municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time' . . ."

The last case I cite is that of *State ex rel Landis, et al. vs. Gifford, et al.*, 154 So. 893. The Supreme Court there had under consideration a law that defined the manner of holding municipal elections in the Town of Frostproof. This Act provided in part:

"Only those persons who, at the time of registration and at the time of voting: (a) are citizens of the United States and have resided in the State of Florida for twelve months and in the Town of Frostproof for six months; (b) are at least twenty-one years of age; (c) either are and have been for six months the record owners of a freehold interest (having an assessed value of at least twenty-five dollars on the last tax assessment roll of said town) in real estate situated within said town or have been engaged for six months in a business, trade or profession in

ELECTORS AND ELECTIONS—Municipalities

said town for which an occupational license is required by said town and have paid the occupational license tax required by said town for the current year; (d) have duly registered upon the registration books of said town at least ten days before any such election, shall be qualified to vote in any election held in and by said town. It shall not be necessary for any such person to pay any poll tax whatsoever as a prerequisite to voting in any such election of said town."

The Court said:

"It is not necessary to discuss the salient questions of law presented in this case. The real question is, 'Did the Legislature have power and authority to enact the provisions of section 1 of chapter 16433, supra?'"

"The leading case in this state dealing with the power of the Legislature to enact a statute of this sort is *State ex rel. Lamar v. Dillon et al.*, 32 Fla. 545, 14 So. 383, 385, 22 L. R. A. 124. The enunciation of the law as stated in that case has been followed in many jurisdictions and has been followed in this jurisdiction in the following cases: *City of Jacksonville et al. v. Bowden*, 67 Fla. 181, 64 So. 769, L. R. A. 1916D, 913, Ann. Cas. 1915D, 99; *State ex rel. Johnson v. City of Sarasota*, 92 Fla. 563, 109 So. 473; *State ex rel. Johnson v. Johns et al.*, 92 Fla. 187, 109 So. 228; *West et al. v. Town of Lake Placid*, 97 Fla. 127, 120 So. 361; *Leavine v. State*, 101 Fla. 1370, 133 So. 870; *State ex rel. McMullen et al. v. Johnson*, 102 Fla. 19, 135 So. 816; *State ex rel. Attorney General et al. v. City of Ft. Lauderdale*, 102 Fla. 1019, 136 So. 889.

"... Neither do we feel that we could add to or improve on what has been said in the cases above cited in which we have held that it is competent for the Legislature to enact statutes of this character and that the same are not in violation of the provisions of the Constitution of this State."

I am, therefore, of the opinion that a municipality can by a provision of its charter permit people who have been residents of the State for only thirty days to register and vote at its elections.

Supplemental Opinion March 28, 1941.—041-172.

To Hon. J. N. Lummus, Jr., County Tax Assessor, Miami:

I am of the opinion under the cases cited in my letter of March 6 to the Comptroller, that the Legislature can make any provision with reference to voting in a municipal election that it chooses even to the extent of allowing non-residents of the State of Florida to participate in municipal elections held in this State. As a matter of fact, I think you will find under certain city charters in some beach resort towns, particularly near Jacksonville, that many of the voters maintain their citizenship and vote in the City of Jacksonville in the municipal elections there, yet they are permitted to vote in the municipal elections in some of the beach towns under the particular city charters. I, therefore, feel that each case must be governed by the facts thereof.

PARTY ASSESSMENTS

March 10, 1942.—042-122.

AUTHORITY—STATE EXECUTIVE COMMITTEE

QUESTION: Has the State Democratic Executive Committee for First Congressional District the right to levy and collect assessment from candidate for Congressman-at-Large?

To Hon. R. A. Gray, Secretary of State:

There is no authority in our statute law or the quoted resolution of the State Democratic Executive Committee, for any such assessment.

ELECTORS AND ELECTIONS—Party Assessments

Candidates for the office of Congressman-at-Large are in the same position with reference to statutory filing fees and party committee assessments, as other candidates who are to be voted for throughout the whole State.

PARTY ASSESSMENTS

March 6, 1942.—042-107.

DISPOSITION—REMIT TO PARTY

QUESTION: What disposition should be made of party committee assessments paid to the Secretary of State by candidates for Judge and Solicitor of Criminal Courts of Record at the time of paying their filing fee?

To Hon. R. A. Gray, Secretary of State:

Such assessments should be remitted by you to the County Executive Committee of the political party holding the primary, since the apparent intention of the Legislature has been to provide one place where a candidate may comply with requirements as to filing fee and committee assessments, as evidenced by Chapter 19009, Acts of 1939, which was an amendment to Chapter 16990, Acts of 1935, the first enactment providing for this service by the Secretary of State. See also Chapter 20850, Acts of 1941.

QUALIFICATIONS

March 19, 1942.—042-134.

CANDIDATES—DUTIES—QUALIFYING DATE

QUESTION: Under Chapters 19008 and 19009, Acts of 1939 what is the last date candidates for nomination in the 1942 primaries may qualify?

To Hon. R. A. Gray, Secretary of State:

My construction of Chapters 19008 and 19009, Acts of 1939,—applying, respectively, to candidates to be voted for wholly within a single county on the one hand, and those to be voted for in more than one county, on the other hand, requires qualification by the payment of filing fee and committee assessment forty-five clear days previous to the day of the first primary election, which would be March 20, 1942; that is to say that forty-five clear days should elapse between the date of qualification and the date of the first primary election, which is May 5, 1942.

QUALIFICATIONS

F

April 16, 1942.—042-190.

CANDIDATES—EXPENSE STATEMENTS—FILING TIME

QUESTION: A candidate for Congress whose name was certified by the Secretary of State to the various Boards of County Commissioners of the Congressional District involved, on April 4, 1942, sent to the Secretary of State (a) First Statement of Campaign Expenses, dated April 6, 1942, notarized April 7, 1942; (b) a copy of such statement, dated April 6, 1942, and (c) an affidavit by the candidate setting forth, among other things, that he was mailing duplicate statement. The documents just referred to reached the office of the Secretary of State on April 15th. From the face of the affidavit and the duplicate so received, it appears that the candidate did not wilfully fail to file his campaign expense

ELECTORS AND ELECTIONS—Qualifications

statement in time to reach the office of the Secretary of State before the statutory limitation for filing. Is it the official duty of the Secretary of State to certify to the various Boards of County Commissioners of the District involved, the failure of the candidate to file his campaign expense statement, the result of which would probably be the omission of the candidate's name from the ballots to be voted in the coming primary?

To Hon. R. A. Gray, Secretary of State:

I have recounted the facts and circumstances because your duty depends upon their interpretation and a proper estimate of the extent of your power to apply the law thereto.

While, ordinarily, your duties and powers in matters such as these are purely ministerial, the peculiar facts and circumstances here involved, particularly the fact that to make the certificate of failure of the candidate to timely file his campaign expense statement, calls for an affirmative act on your part, and that affirmative action would, in all probability, necessitate the reprinting of the ballots in every county of the District involved—the absentee voting status contemplating that ballots shall be available at least fifteen days before the first primary, and your certificate as to qualified candidates, among whom the candidate involved is listed, having already been delivered to the various Boards of County Commissioners, and in further view of the holding of our Supreme Court, in the case of County Canvassing Board of Primary Elections of Hillsborough County v. Lester, 118 So. 201, that the language of the statute relative to the filing of campaign expense statements and prescribing the penalty for a non-observance thereof, to-wit, "refusing or wilfully failing," means more than a mere passive failure, and involves some degree of conscious wrong, coupled with a consideration of possible unfortunate consequence to the candidate himself, it would seem that the primary duty of determining whether or not the statute has been wilfully violated, in contemplation of law, rests with the official who is called upon to act or refuse to act. His action would, in any event, of course, be subject to judicial supervision.

Therefore, if, as indicated by your letter, you have reached the conclusion that the candidate did, as a matter of fact, mail his statement in ample time for the same to have reached your office within the period prescribed by law, and that its failure to be delivered within such time was due to a miscarriage of the mails, I am of opinion that you would be justified in assuming that there was no such wilful failure as contemplated by law. In such circumstances, no affirmative action on your part would be necessary or required.

QUALIFICATIONS

March 2, 1942.—042-101.

CANDIDATES—POST PRIMARY STATEMENT

QUESTION: (1) Has a candidate defeated in 1940 primary who failed to file post primary expense statement, the right to qualify as a candidate in 1942 primary?

(2) In such circumstances what are the powers and duties of the Board of County Commissioners?

To Hon. R. A. Gray, Secretary of State:

(1) Such failure does not disqualify one so defaulting from becoming a candidate in the 1942 primary.

ELECTORS AND ELECTIONS—Qualifications

(2) The Board of County Commissioners are without authority to determine the eligibility of one seeking qualifications as a candidate other than to determine whether or not the oath required by the statute has been taken and filed within the time prescribed by law, they being ministerial officers only, and the determination as to the truth or falsity of the oath and as to whether or not the candidate so seeking to qualify had violated any of the laws relating to the primary laws being strictly a judicial function.

QUALIFICATIONS

October 21, 1941.—041-593.

SUPERVISOR OF REGISTRATION—ELIGIBILITY FOR OTHER OFFICE

QUESTION: Under Section 1 of Chapter 9271, Acts of 1923 (258 C. G. L.), should Supervisor of Registration resign six months before qualifying as a candidate for another office, or six months before assuming the duties of another office?

To Hon. R. A. Gray, Secretary of State:

The qualifications or eligibility of a person to become a candidate for nomination in a primary is to be determined as of the date upon which the term of office to which he aspires begins. See *Davis v. Crawford*, 95 Fla. 438, 116 So. 41, in which the eligibility of a State Senator whose term as such would have expired upon the election of his successor, or his own election as Governor, was upheld.

Although the terms of office of members of the Legislature are for two years for House membership and four years for the Senate, and expire upon the appropriate general election days, and that of practically all other elective county and state officers run in cycles of four years, beginning on the first Tuesday after the first Monday in January following the general election, and that Section 5 of Article III of our Constitution, renders members of the Legislature ineligible for appointment or election to any civil office under the Constitution, that has been created, or the emoluments of which have been increased during the time for which they were elected a member of the Legislature, and although the purpose of the sentence in Section 258 C. G. L. may have been to deprive Supervisors of Registration who aspired to other offices, of control of the poll lists of electors for selfish purposes, the language adopted by the Legislature seems clearly to refer to eligibility to hold office, and not to be elected or nominated thereto.

My conclusion, therefore, is that if Mr. Perkins seeks election to the office of Tax Assessor, the term of which begins on the first Tuesday after the first Monday in January following the election, he should cease to be Supervisor of Registration six months before that date, and that the provision of the statute mentioned does not prohibit him from becoming a candidate for nomination in the 1942 Primaries and continuing in the office of Supervisor of Registration to a date six months before taking over the new office.

SUPERVISOR OF REGISTRATION

February 13, 1941.—041-66.

SALARY—CENSUS

QUESTION: The Census Bureau has just announced that the population of Orange County is now 70,074. What should the salary of the Supervisor of Registration be? Would Chapter 17,399, Acts of 1935, which was passed on the same day as Chapter 17,220, repeal any provision under Chapter 17,220?

ELECTORS AND ELECTIONS—Supervisor of Registration

To Mr. R. T. Tucker, Supervisor of Registration, Orange County, Florida:

I am of the opinion that Chapter 17,220, Acts of 1935, which fixed the salary of Supervisors of Registration in Counties of not less than 55,000 and not more than 75,000, according to the *State census of 1935*, at \$3600.00 per year should be considered in the nature of a local bill to the extent that since the Legislature definitely tied the application of this Act to counties of not less than 55,000 and not more than 75,000 people according to the *State census of 1935*, counties that came within the brackets of 55,000 and not more than 75,000 people according to the *State census of 1935*, are unaffected by any change in population as reported by the Federal census, for the reason that the census that was to control was the *State census of 1935*, and that Chapter 17,399, Acts of 1935, should be considered in the nature of a general Act and to apply to all those counties who did not come within the specific brackets in 1935 as fixed by Chapter 17,220, Acts of 1935, and to those counties only, and that Chapter 17,399, Acts of 1935, did not repeal nor affect the provisions of Chapter 17,220, Acts of 1935.

I have taken this view upon the theory that an Act which is in effect a general act will not be held to repeal or modify an act which is in effect a local act embraced within the general terms of the general act unless the general act is a revision of the whole subject or unless the two acts are so repugnant as to clearly show a legislative intent that one should repeal the other. By analogy see: *Ex parte Davidson*, 76 Fla. 272, 79 So. 727; *State vs. Sanders*, 79 Fla. 835, 85 So. 333; *State vs. Southern Land and Timber Co.*, 45 Fla. 374, 33 So. 999; and *Turner vs. State ex rel. Martens*, 135 Fla. 380, 185 So. 831.

I have also considered the question as to the proper construction to be placed upon acts that are passed by the Legislature on the same day. I find in checking the Journals of the Legislature that both 1935 Acts were passed the same day. Our Supreme Court has not had this particular question before it but I find the weight of authority on statutory construction seems to be that where two legislative acts were passed by the legislature at the same session or on the same day, both should be given that construction which would allow them to stand as valid laws, unless so repugnant to each as to make such a construction impossible. See *Old Tavern Farm, Inc. vs. Fickett*, 125 Me. 123, 131 Atlantic 305; *Swift and Company vs. Sones*, 142 Miss. 660, 107 So. 881; *Crow vs. General Cable Corporation*, 223 Ala. 611, 137 So. 657; and *Merchants Transfer and Warehouse Company vs. Gates*, 180 Ark. 96, 21 S. W. (2d) 406.

I find an excellent statement of the rules of construction in the case of *People's Trust and Savings Bank vs. Hennessey*, 153 N. E. 507. One particular rule that struck me most forcibly was:

"Statutes relating to the same subject and enacted at the same session of the Legislature must be construed to give effect to each rather than to infer that one destroys the other."

I, therefore, answer the first question you propound as to your salary, that it should be the amount fixed by Chapter 17,220, Acts of 1935. This, of course, answers your second question with regard to whether Chapter 17,220 was repealed by Chapter 17,399 in the negative.

In arriving at the foregoing conclusions, I have not considered the constitutionality of the several Acts of the Legislature mentioned herein.

ELECTORS AND ELECTIONS—Vacancies**VACANCIES**

August 10, 1942.—042-390.

BOARD OF PUBLIC INSTRUCTION—NOMINATION FOR MEMBERSHIP

QUESTION: A member of the county board of public instruction, who was nominated in the primary election, has since died.

(1) What procedure should be used for qualifying and electing a successor?

(2) What procedure is to be followed in having names put on the ballot in the November general election?

To Hon. Colin English, State Superintendent of Public Instruction:

(1) Section 102.48, Florida Statutes 1941, in part provides:

"In the event of the death, resignation or removal of any person nominated for office in the primary election between such primary election and the ensuing general election or if for any cause there is a vacancy in any nomination or in any office and no method is otherwise provided herein for filling such vacancy in nomination, then and in that event the state executive committee, in the case of a vacancy in a state office or the county executive committee in the case of a vacancy in a county office, shall call a primary election to provide for a nominee for such office and in case no candidate receives a majority of the votes cast in the primary so called and held, a second primary election shall be held within ten days thereafter; provided, however, that should a vacancy occur in any nomination for county office or in any county office less than thirty days before a general election, or should a vacancy occur in any nomination for a state office or in any state office less than forty-five days prior to a general election, then and in that event, the county executive committee or the state executive committee, depending upon the nature of the office for which a vacancy in nomination shall have occurred, shall fill such vacancy in nomination by selecting a nominee for such office and all such nominations whether by primary or by executive committee shall have the same force and effect and shall entitle the nominees to all the rights and privileges that would accrue to them if they had been nominated in the regular primary elections."

I fail to find any other statutory method provided for filling such vacancy in nomination. Such vacancy having occurred more than thirty days prior to the next ensuing general election, under the foregoing statute, it is my opinion that the county executive committee should meet and adopt a resolution calling a primary election to provide a nominee for such office and thereby fill such vacancy in nomination.

(2) After said special primary election is called as aforesaid, it should be held and conducted, and the name of the elected nominee be certified for a place on the general election ballot, in all respects, according to the applicable provisions of the general primary election laws of Florida.

VOTING

April 14, 1942.—042-186.

ABSENTEE—TIME

QUESTION: What is the period within which a voter who expects to be absent from his home county on the day of election, may vote, on application in person to the County Judge of his home county?

To Hon. R. A. Gray, Secretary of State:

The Statute provides that such a vote may be cast at any time not less than three days nor more than fifteen days next prior to the day of election.

I am of the opinion that the period within which one may vote in advance of the election as above indicated, begins Monday, April 20th, and ends at midnight Friday, May 1st.

CHAPTER VIII

OFFICES, OFFICERS AND RECORDS

RETIREMENT, INSURANCE, EXPENSES AND APPOINTMENTS

June 23, 1942.—042-315.

MUNICIPAL EMPLOYEES—GROUP INSURANCE

QUESTION: Under the following outlined plan of group insurance, would the City of Clearwater be engaging in the insurance business?

In case of the death of any employee, a deduction of 3% of one month's salary is to be made from each employee of the City and the resulting proceeds to be paid to the spouse of the deceased employee. In case of the death of a dependent child of an employee, or his father or mother residing in the same household, a similar deduction of 3% is to be made from each employee of the City and the money paid to the employee who has had the death in his family.

In case of an employee or a dependent member of his immediate family confined to a hospital for thirty days or longer, then a deduction of 1% of one month's salary is to be made from each City employee and the funds paid to the employee who is in the hospital or who has a member of his family in the hospital. No benefits are to be paid if hospitalization does not continue for a full thirty day period. In the event of hospitalization for thirty days or more, followed by death, then the 3% deduction and 1% deduction will both be made.

The plan is to be completely voluntary in its operation. In other words, no employee will be subject to the deduction nor will he be entitled to the benefits unless he has signified in writing that he wishes to participate in the plan.

To Hon. J. Edwin Larson, Insurance Commissioner:

It is my opinion that the City of Clearwater will not be placed in the position of engaging in the insurance business, and my reason for so holding is based on Chapter 20852, Laws of Florida, 1941.

The above law specifically authorizes the employees of any governmental unit to enter into agreements with insurance companies for group insurance. Under the method proposed by the employees of the City of Clearwater there is no agreement to be made with an insurance company, and it is my opinion that by such plan it cannot be construed as engaging in the insurance business, for it is, strictly speaking, a gratuitous donation, but, of course, it is understood that it shall be the voluntary act of the employees participating in such a plan.

RETIREMENT, INSURANCE, EXPENSES AND APPOINTMENTS

July 11, 1941.—041-373.

STATE EMPLOYEES—GROUP INSURANCE

QUESTION: (1) May the State Road Department under Chapter 20852, Acts of 1941, authorize an insurance company to sell group insurance to its employees?

(2) May the Department deduct from the salaries of its employees an amount sufficient to pay the premiums on such insurance?

OFFICES, OFFICERS AND RECORDS—Retirement, Insurance, Expenses and Appointments

(3) What is the proper method to be followed in making such deduction?

(4) Should payment of the premiums be by requisition on the State Comptroller?

To Hon. Thos. A. Johnson, Chairman, State Road Department:

(1) Your department is authorized and empowered, but not required, to provide for insurance of your employees against certain hazards, upon a group insurance plan, and to enter into agreements with insurance companies to provide such insurance.

(2) You are authorized to make deductions from the salary of each employee who voluntarily and in writing signifies his desire to become a member of such a group, and make the necessary deductions from his salary, retaining the amount deducted with which to pay directly to the insurer the premiums.

(3) As to the method to be employed, I suggest that your department negotiate and enter contract with some insurer willing and responsible to carry the risks, taking care to provide in such contract for sufficient latitude in which to make such adjustments at the end of stated periods necessary to accord with the privilege of the employee to withdraw from such group upon any pay day.

(4) Assuming, as I understand is the case in such contracts by private industry, that the insurer will require payment of the premiums at stated periods in an amount sufficient to cover all the risks undertaken, your payment to the insurer should be by requisition for that purpose on the State Comptroller.

The statute is ample authority for the issuance by the Comptroller of the warrants therefor and the countersigning of the same by the Governor.

RETIREMENT, INSURANCE, EXPENSES AND APPOINTMENTS

August 8, 1941.—041-428.

STATE EMPLOYEES—GROUP INSURANCE

QUESTION: Under Chapter 20852, Acts of 1941, is the Beverage Department authorized to pay any part of Group Insurance premium from its operating expense fund?

To Hon. E. W. Scarborough, Director, Beverage Department:

You are advised that the only fund from which such Group Insurance premiums may be paid is that created by deductions from the wages or salaries of such employees who consent thereto. I find no authority for such payment out of your operating expense fund.

RETIREMENT, INSURANCE, EXPENSES AND APPOINTMENTS

August 27, 1941.—041-486.

STATE EMPLOYEES—GROUP INSURANCE

QUESTION: May the State Cabinet enter into agreements with insurance companies to cover all of the employees of the State with group insurance, under Chapter 20852, Acts of 1941?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

You are advised that the statute named confers authority to negotiate for and obtain insurance by the respective department heads,

OFFICES, OFFICERS AND RECORDS—Retirement, Insurance, Expenses and Appointments

boards and commissions of the State and of the counties. There is no provision by which the powers may be exercised jointly or by any other State or county agency.

RETIREMENT, INSURANCE, EXPENSES AND APPOINTMENTS

February 13, 1942.—042-83.

STATE EMPLOYEES—GROUP INSURANCE

QUESTION: Is it legal for the Commissioner of Agriculture to expend from the General Inspection Fund part of premiums for group insurance coverage for employees of the Department of Agriculture?

To Hon. Nathan Mayo, Commissioner of Agriculture:

It is my opinion that you are authorized to expend in payment of such group insurance premiums, only such sum of money as is deducted from the wages or salaries of the employees of your Department who consent to such deductions in writing.

I find no authority for the payment of any part of such premiums out of the General Inspection Fund.

RETIREMENT, INSURANCE, EXPENSES AND APPOINTMENTS

February 11, 1941.—041-63.

STATE EMPLOYEES—MAXIMUM TRAVELING EXPENSES

QUESTION: What is the maximum amount to be allowed State Officers and Employees for subsistence when traveling on State business?

To Hon. J. M. Lee, Comptroller:

Since the issuance of two opinions on this question appearing on pages 611 and 612 of the Biennial Report of the Attorney General for 1933-1934, the Supreme Court of Florida has passed upon the question in the case of State, ex rel. Parker v. Lee, 113 Fla. 40, 151 So. 491. In the light of this decision, construing the statute regulating this subject (Chapter 16184, Acts of 1933), it is my opinion that the maximum amount to be allowed State officers and State employees (this includes Cabinet officers as well as other officers) when traveling on State business, is \$4.50 for subsistence and five cents per mile mileage when traveling in a privately owned car (automobile).

This limitation is applicable when the officer or employee is traveling within the State of Florida, according to the Supreme Court decision, and has no application to expenses incurred by officers and employees while traveling outside of the State.

We find an express exception to these traveling allowances applicable to members of the State Racing Commission, provided in Chapter 17276, Acts of 1935, Section 3, where the law specifies that "the provision of Section I, Chapter 16184, Acts of 1933, shall be inapplicable," meaning inapplicable to the necessary expenses, including traveling expenses, of members of the Racing Commission.

OFFICES, OFFICERS AND RECORDS—Retirement, Insurance, Expenses and Appointments**RETIREMENT, INSURANCE, EXPENSES AND APPOINTMENTS**

October 10, 1941.—041-571.

STATE EMPLOYEES—RESIDENCE REQUIREMENTS

QUESTION: Interpretation of requirement of "residence" as applied to employees of the State.

To Hon. Angus Laird, Supervisor, Merit System, State Board of Health and Crippled Childrens' Commission.

A requirement of "residence" in cases of this kind is generally construed to mean "legal residence"—that is, the place of domicile or permanent abode as distinguished from temporary residence. A legal residence may be acquired in Florida by one who coming from another State or country actually lives in this State with the intention of permanently remaining here.

In this connection, however, I call your attention to the provisions of Chapter 16183, Laws of Florida, Acts of 1933, which reads as follows:

"Section 1. From and after the passage of this Act all persons employed to work for the State of Florida or for any county of the State, shall be bona fide residents of the State for two years next prior to such employment, except only where after due diligence no person can be found in the State possessing the required qualifications necessary to the particular employment.

"Section 2. It shall be unlawful for any officer or board, either State or County, to employ any person to work for the State or for any county in the State, who has not been a bona fide resident of the State for the last past two years at the time of such employment, except only when after due diligence no such resident of the State can be found possessing the required qualifications necessary to fill the particular employment.

"Section 3. Any officer or board or member of any official board, either State or County, violating the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction punished accordingly. Any officer violating this Act shall be subject to removal by the Governor." Sections 478(2) and 7546(1), CGL Supplement.

RETIREMENT, INSURANCE, EXPENSES AND APPOINTMENTS

July 31, 1941.—041-423.

STATE EMPLOYEES—SALARY—RETIREMENTS

QUESTION: One of the employees at the Florida School for the Deaf and Blind has received an annual salary of \$900 and living expenses including room, meals, laundry and incidentals valued at \$300 per annum, and the Board of Control has recommended the retirement of said employee at one-half that amount or \$50 per month. Can such living expenses be considered as part of the employee's salary in computing the amount on which said employee may retire, under the provisions of Chapter 20499, Laws of Florida, Acts of 1941?

To Hon. J. M. Lee, Comptroller:

Chapter 20499, Acts of 1941, provides that certain state officers or employees may retire on one-half of the average monthly salary received during the last ten years of service.

OFFICES, OFFICERS AND RECORDS—Retirement, Insurance, Expenses and Appointments

"Salary" in its original and strict sense signifies a fixed compensation for services rendered. "Allowance" or "perquisites" may be and most frequently are uncertain and variable as to amounts.

Whether we consider the ordinary and popular signification of the word or more accurate and technical meaning attached to it by lexicographers, "allowance" is entirely inappropriate to express the idea of a fixed compensation adopted for the payment of services rendered by one person to another.

"Allowance" has been defined as a payment beyond the agreed salary of the officer for additional services rendered by him.

"Perquisite" has been defined as any profit or pecuniary gain for services beyond the amount fixed as salary or wages.

In re Retirement of State Employees, 28 Pa. Dist. 393, 394, the term "salary" was held not to include estimated amount of maintenance of state employees.

The facts submitted in your request for an opinion indicate that the employee in question received a *compensation* which included \$900 per annum as *salary* and living expenses or perquisites estimated at \$300 per annum, making a yearly compensation of \$1200. However, all compensations are not salaries, although all salaries are compensation.

It is, therefore, my opinion that such living expenses as you have mentioned in your request do not constitute a part of the "salary" contemplated by Chapter 20499, *supra*, and the employee may not include such living expenses, in addition to regular salary, in computing the amount on which such employee may retire.

RETIREMENT, INSURANCE, EXPENSES AND APPOINTMENTS

February 9, 1942.—042-71.

STATE OFFICERS—FEDERAL AND STATE COMMISSIONS

QUESTION: May members of Rationing Boards in Florida having official commissions from the State Government also accept official appointments from the Federal Government? The Federal appointment would be in the nature of a commission and such appointee would be a Federal officer rather than a Federal employee.

To Hon. W. C. Sherman, State Rationing Administrator, Florida State Defense Council:

Section 15 of Article XVI of the Florida Constitution prohibits a person holding any office of honor or profit under the government of this State from holding or performing the functions of any office under the Government of the United States.

From the earlier opinion of State ex rel Clyatt v. Hocker, 39 Fla. 477, 22 So. 721, we get a clear distinction between an officer to whom is delegated a portion of the sovereign power, as in the case of a commission from the Governor of Florida, and a mere employee who has no such delegation.

Therefore, one person could not under our Constitution hold an official commission from the State and exercise any function as an officer under the Government of the United States at the same time.

OFFICES, OFFICERS AND RECORDS—Retirement, Insurance, Expenses and Appointments

February 19, 1942.—042-71.

I desire to supplement and clarify the above opinion by the following statement:

Any commission or appointment to what is known as the State Defense Council will be construed to be an appointment to emergency, military, or war service, rather than an appointment or office of honor or profit, except where the position carries a salary. If the position carries a salary, it then is a position of profit, and if the person receiving the same is the holder of either Federal, State, County, or municipal office, he is ineligible under Section 15 of Article XVI of the Florida Constitution for such appointment

COMMISSIONS

June 6, 1942.—042-285.

BOND—FLORIDA KEYS AQUEDUCT COMMISSION—MEMBERS

QUESTION: Should two new members of the Commission, about to be appointed by the Governor, be required to furnish bond in the sum of \$10,000.00 before commission issues?

To Hon. R. A. Gray, Secretary of State:

In view of the fact that Chapter 21230, Acts of 1941 does not repeal Chapter 18530, Acts of 1937, does not purport to amend the same or any section thereof, but recognizes appointments made thereunder and contains more definite provisions as to the terms of successive members and the filling of vacancies, and removes residential qualifications as originally required, it is my opinion that the original requirement as to the giving of bond continues in force and applies to all members who may hereafter be appointed to such Commission.

COMMISSIONS

September 11, 1941.—041-508.

BOND—JUSTICES OF THE PEACE—PREMIUM PAYMENT

QUESTION: What fund should pay the premium on Justice of the Peace bonds and other fee officers' bonds?

To Hon. J. M. Lee, Comptroller:

Section 4 of Chapter 20523, Acts of 1941, provides "The cost of the premium on such bond (surety bond of public officials) shall be paid out of the General Revenue Fund of the State or out of the County or out of the various Districts, depending upon the class into which such officer belongs. In the event any excess premium over the base premium rate should be charged in the procurement of the bonds herein provided for, such excess premium shall be paid by the individual officer or official."

I am of the opinion that the premiums on the Justice of the Peace bonds and other county fee officers' bonds should be paid out of the General Revenue Fund of the County wherein the Justice of the Peace or other county fee officers reside.

OFFICES, OFFICERS AND RECORDS—Commissions
COMMISSIONS

June 25, 1941.—041-346.

BOND—PUBLIC OFFICIALS—PREMIUM REFUND

QUESTION: Under Chapter 20523, Acts of 1941, is a public official entitled to a refund of the premium on his surety bond?

To Hon. W. M. Wainwright, State Auditor:

If the officer has paid the premium on his bond for the year 1941, he is entitled to a refund from the general revenue fund, or county fund, or district fund, depending, of course, whether the officer is a State, county, or district officer; such refund to be calculated from the date that said chapter became a law, which was on May 30, 1941, to the expiration date of the premium year on said bond. I call your attention to the fact that in the event there is an excess premium charge over the base premium rate, the excess premium must be paid by the individual officer or official, so in those events, if any, you should deduct the excess premium charge before calculating the refund.

COMMISSIONS

December 13, 1941.—041-697.

BOND—TAX COLLECTOR—TAG DEPARTMENT AGENT—PREMIUM

QUESTION: When Tax Collector is not acting as a county officer, but is acting as an agent of the Tag Department of the State of Florida, should the premium on his bond be paid by the County or out of the General Revenue Fund of the State?

To Hon. J. M. Lee, Comptroller:

Chapter 20523, Section 1 provides:

"In all cases where public officials . . . either State, County or District, are now, or shall hereafter be required to post fidelity or performance bonds, all such bonds shall be written by surety companies authorized by law to do business in the State of Florida."

Section 4 provides:

"The cost of the premium on such bond shall be paid out of the General Revenue Fund of the State, or out of the County or out of the various Districts, depending upon the class into which such officer belongs . . ."

Since the tax collector when he acts as tag agent is not acting as a county officer, but is acting as an agent of the Tag Department of the State of Florida, I am of the opinion that in view of the language of Chapter 20523, above quoted, that the premium on such bond should not be paid by the County, but should be paid under the above provision of Section 4 of said law out of the General Revenue Fund of the State.

COMMISSIONS

March 11, 1942.—042-124.

BOND—TAX COLLECTOR—TAG DEPARTMENT AGENT—PREMIUM

QUESTION: Should the premium on bonds given to the Motor Vehicle Commissioner by the Tax Collector as agent of the Motor Vehicle Department for sale of license plates be paid by the County or out of the General Revenue Fund of the State?

OFFICES, OFFICERS AND RECORDS—Commissions

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

I have examined the original Act that places the duty of delivery of license plates to applicants upon the tax collector, being Chapter 16085, Acts of 1933, and it appears to me that the tax collector has had an additional duty imposed upon him by law but that he is still an agent of the Tag Department. As a matter of fact, Section 2 of said Chapter so states. I quote a portion of same:

"The sale of license plates by the Motor Vehicle Commissioner or his agents."

I find that this Chapter has been carried into the Compiled General Laws of 1927, Permanent Supplement, as Section 1281. I find that in certain counties the County Judge has had this duty imposed upon him—Sec. 1281 (1). In certain other counties this duty has been imposed upon the county Supervisor of County Registration—Sec. 1281 (2).

The tax collector, under Section 1281, Permanent Supplement, Compiled General Laws of 1927, is required:

"To give a good and sufficient surety bond payable to the State Motor Vehicle Commissioner and his successors in office, conditioned that he will faithfully and truly perform the duties imposed upon him according to the requirements of law and the rules and regulations of the State Motor Vehicle Commission, and that he will well and truly pay over and account for all license plates, records and other property and money which may come into his possession or control by reason of such service."

We therefore see that this bond only protects the Motor Vehicle Commissioner and does not protect the County or the State for other tax moneys received by the tax collector and, although the Supreme Court held, in the case of Holland, as Governor, etc., vs. American Surety Company, in an opinion rendered on January 16, 1942, that the general bond given by the tax collector also covered any defalcation of the tax collector including any balance remaining due after the bond given to the Motor Vehicle Commissioner had been exhausted, I do not believe it could be said that the bond given to the Motor Vehicle Commissioner would protect the County or State for general tax revenues received by the tax collector. I am, therefore, of the opinion that the bond given to the Motor Vehicle Commissioner protects the Motor Vehicle Commissioner according to the conditions of the bond; that the County, however, receives no benefit whatsoever from the execution of said bond.

I am of the opinion that under Section 4, Chapter 20523, Acts of 1941, which reads:

"The cost of the premium on such bond shall be paid out of the General Revenue Fund of the State or out of the County or out of the various districts, depending upon the class into which such officer belongs . . ."

that the premium on the bond shall be paid out of the General Revenue Fund of the State.

I therefore reaffirm my opinion of December 13, 1941 (041-697) and hold that the premium on the bond given to the Motor Vehicle Commissioner, as provided by Section 1281, Permanent Supplement, Compiled General Laws of 1927, should be paid out of the General Revenue Fund of the State.

OFFICES, OFFICERS AND RECORDS—Commissions**COMMISSIONS**

August 22, 1942.—042-413.

FEE—FLORIDA CRIPPLED CHILDREN'S COMMISSION—PAYMENT

QUESTION: Has the Florida Crippled Children's Commission authority to pay the \$10 fee required by statute for the issuance of a commission to a member thereof?

To Hon. Terry Bird, M.D., Director of Services, Florida Crippled Children's Commission:

Among other things, Section 113.01, Florida Statutes 1941 prescribes a fee of \$10 for each commission of any kind issued by the Governor and attested by the Secretary of State.

Members of the Florida Crippled Children's Commission receive no salary or other compensation except actual expenses incurred while in the performance of their duties, the accounts of which shall be paid monthly by the State Treasurer upon itemized vouchers duly approved by the Chairman of said Commission and the Comptroller.

The fee required by Section 113.01, in my opinion, should be paid individually by those appointed or elected to offices which carry remuneration for services rendered, but should not be an individual charge against those qualifying for a purely nonremunerative office such as membership on your Commission.

The Legislature, in my opinion, did not intend that the individual appointed to such a position should give of his time and also pay out of his own pocket for the privilege of carrying on this important function of State Government.

In the present case, this commission fee may properly be classed as an actual expense incurred by the member while in the performance of his duties as such, and therefore payable by the Florida Crippled Children's Commission out of its necessary and regular appropriation.

Any opinions heretofore rendered by this office in conflict herewith are hereby specifically rescinded.

LEAVE OF ABSENCE

June 4, 1942.—042-281.

STATE EMPLOYEES—ATTENDANCE AND LEAVE

QUESTION: What statutes govern the attendance and leave of State employees?

To Hon. Angus Laird, Merit System Supervisor, Gainesville, Florida:

I find no statutory provisions relating to this subject.

The hours of work, sick leave, and vacation leave of State employees, I understand, have from time immemorial been regulated by the respective department heads.

Recently the Governor and his cabinet set the following hours to be observed by the employees of their respective departments: 9:00 A. M. to 1:00 P. M., and 2:00 P. M. to 5:00 P. M., except Saturdays, when the hours are 9:00 A. M. to 1:00 P. M.

The cabinet as such has not adopted any particular schedule for vacation and sick leave, although I understand vacation leave in such

OFFICES, OFFICERS AND RECORDS—Leave of Absence

departments is two weeks annually and sick leave is governed almost entirely by the circumstances of the particular case.

Perhaps you are familiar with the regulations of the Florida Industrial Commission with reference to attendance and leave of its employees. If not, I am sure they would be glad to give you this information, and it may be helpful to you because it is regulated, I believe, by rules and regulations adopted by the Commission, such as you indicate you are preparing for the State Board of Health, and Florida Crippled Children's Commission, and the County Health Units.

MILITARY LEAVE OF ABSENCE

November 20, 1942.—042-527.

BASIC SCIENCE BOARD—EMPLOYEES—STATUS OUTSIDE FLORIDA

QUESTION: For the past year one of the members of the Board of Examiners in the Basic Sciences has been in military service and stationed within the State of Florida, but during said time was able to and did perform his duties as such board member. Recently this member has been transferred by the military authorities to another state.

In connection with the foregoing, what is his status as a member of said board?

To Hon. M. W. Emmel, Chairman, Board of Examiners in the Basic Sciences, Gainesville, Florida:

It is my opinion that no vacancy exists under the law in the office to which you refer. Members of your board are public officials, and from your letter it appears that the member to whom you refer would be entitled to leave of absence under Chapter 115 Florida Statutes, 1941, upon application therefor to the Governor. If such application is made and the leave granted, then the Governor would have the authority to appoint someone to function during the member's absence.

Of course, if the member resigns, there would then be such a vacancy in the office as the Governor is authorized to fill by appointment for the unexpired term.

MILITARY LEAVE OF ABSENCE

November 12, 1942.—042-570.

BOARD OF CONSERVATION—EMPLOYEES

QUESTION: Should an employee of the State Board of Conservation who enlists in the United States Coast Guard and serves as a "guard" at the Tampa Shipbuilding Yard, Tampa, Florida, and is paid either by the Tampa Shipbuilding Yard or by the United States Coast Guard for this service, be paid by your Department for the first thirty days' leave of absence as required by Chapter 20863, Acts of 1941?

To Hon. S. E. Rice, Supervisor of Conservation:

It is my opinion that such employee of your Department is entitled to the provisions under said chapter and, therefore, you should pay him for the first thirty days' leave of absence.

OFFICES, OFFICERS AND RECORDS—Military Leave of Absence**MILITARY LEAVE OF ABSENCE**

October 8, 1941.—041-565.

BOARD OF CONTROL—EMPLOYEES

QUESTION: May student assistants at institutions under the State Board of Control be granted leaves of absence for military service under Chapter 20718, Acts of 1941?

To Hon. J. T. Diamond, Secretary, Board of Control.

It is my opinion that the granting of leaves of absence to employees of the State Board of Control in military service as described in the act, is within the discretion of the Board.

Student assistants at institutions under the State Board of Control, although engaged for part-time work only, are nevertheless employees of the Board of Control and are, therefore, covered by the terms of the Act in the same manner as full-time employees.

MILITARY LEAVE OF ABSENCE

December 28, 1942.—042-580.

BOARD OF CONTROL—EMPLOYEES

QUESTION: Is an assistant of the University Library, who was given a leave of absence to serve as a librarian with the special services of the Army, entitled to receive one month's pay for military leave under Ch. 20718, Laws of Florida, Acts of 1941?

To Hon. J. T. Diamond, Secretary, Board of Control:

By opinion of February 5, 1942, I held that while the granting of leave of absence was discretionary with the employing authority, once leave of absence is granted for military reasons, the person to whom it is granted automatically becomes entitled to all rights and privileges prescribed, including compensation for the first thirty days' leave of absence.

Your inquiry, therefore, raises the question of whether service as a librarian with the special services of the Army comes within the term "active military service" as defined by §2 of said Act (§115.08 Fla. Stat. '41).

Information received from the personnel division of the Army is—that a person serving as a librarian with the special services of the Army is not a member of any branch of the Army.

I am, therefore, of the opinion that the person granted leave of absence to perform such service is not entitled to receive one month's pay for military leave.

MILITARY LEAVE OF ABSENCE

February 5, 1942.—042-63.

BOARD OF PUBLIC INSTRUCTION—EMPLOYEES

QUESTION: (A) Has the county school board power to grant leave of absence to one of its employees for military service?

(B) May county boards pay such persons for not to exceed thirty days or is any discretion in the matter of compensation granted to the County Boards under the provisions of these acts?

OFFICES, OFFICERS AND RECORDS—Military Leave of Absence

To Hon. Colin English, State Superintendent of Public Instruction:

(A) Section 539 of the School Code, as amended by Chapter 20970, Laws of Florida, 1941, provides:

"County Boards shall also have authority to prescribe regulations for the granting, and with the approval of the trustees of the district in which the person is serving, to grant more extended leaves of absence, as follows:

"(2) **MILITARY LEAVE . . .**"

This language indicates that the power of the county board with respect to military leave for a member of the instructional staff is discretionary, although subject to the approval of the district trustees.

Section 7 of Chapter 20718, Laws of Florida, 1941, provides:

"All employees of the State of Florida, and of the several counties of the State of Florida, and of the municipalities or political subdivisions of the State of Florida may, in the discretion of the employing authority of such employee, be granted leave of absence under the terms of this Act, and upon such leave of absence being granted, said employee shall enjoy the same rights and privileges as are hereby granted to officials under this Act, in so far as may be." (Emphasis supplied.)

This provision is broad enough to cover not only members of the instructional staff but all other employees of the county school board. It clearly indicates that the power to grant a leave of absence to any such person is discretionary with the county school board.

My opinion is, therefore, that the power of a county school board to grant a leave of absence to one of its employees for military reasons is discretionary, although in the case of instructional personnel the approval of the district trustees is also required:

(B) While compensation is not provided for by Section 539 of the School Code as amended for one granted a military leave, thirty days' compensation is provided for by Chapter 20718, Laws of Florida, 1941; and inasmuch as the latter is the broader Act, its provisions, in my opinion, are controlling.

Section 7 of Chapter 20718, quoted above, specifies that a leave of absence for military reasons may be granted "under the terms of this Act" and that the person granted the leave "shall enjoy the same rights and privileges as are hereby granted to officials under this Act, in so far as may be." One of the rights granted to officials under the Act, by Section 1 of the Act, is that the official granted a leave of absence for military reasons shall receive full pay for the first thirty days of such leave of absence. Accordingly, an employee granted a leave of absence under Section 7 of the Act is entitled to receive regular compensation for the first thirty days of his leave of absence.

While the granting of such a leave of absence is discretionary with the county school board, as explained in my answer to your first question, there is not any discretion as to the terms and conditions of the leave of absence, inasmuch as such terms and conditions are specified by the Act; hence, once a leave of absence is granted for military reasons, the person to whom it is granted automatically becomes entitled to all rights and privileges by the Act, including regular compensation for the first thirty days of the leave of absence.

OFFICES, OFFICERS AND RECORDS—Military Leave of Absence**MILITARY LEAVE OF ABSENCE**

November 20, 1942.—042-569.

CIVILIAN PILOT TRAINING PROGRAM—MEMBERS

QUESTION: Does the Civilian Pilot Training Program under the Civil Aeronautics Administration constitute federal service in training within the meaning of Section 115.08 Florida Statutes, 1941?

To Florida Industrial Commission:

According to the information attached to your request, when one is accepted for Civilian Pilot Training, he must enlist in the Air Corps Enlisted Reserves, where he remains on inactive status and receives no pay other than subsistence and insurance. Upon graduation from the eight weeks elementary course, glider pilot trainees are called to active duty with the rank and pay of privates and then given additional training. Service pilots or instructor applicants remain under Civilian Pilot Training for their entire training period, which covers from eight to ten weeks.

You further advise that if the trainee does not satisfactorily complete the course he is subject to call by the Army and may be placed at the discretion of the War Department in military or civilian service or may be discharged.

It appears from the foregoing information that such trainees are subject to the War Department; that is, if they satisfactorily complete their course they are called to active duty. If they do not satisfactorily complete the course, they are still subject to call for active duty.

It is my opinion that when State employees take the required oath and become members of the Air Corps Enlisted Reserves for the purpose of Civilian Pilot Training, they are then within the provisions of Section 115.08 Florida Statutes 1941 and entitled to the benefits thereof.

MILITARY LEAVE OF ABSENCE

March 13, 1942.—042-127.

COUNTY JUDGE—RESIGNATION AND APPOINTMENT OF SUCCESSOR

QUESTION: When a county officer, such as a County Judge, is called for active military service, how may the vacancy in the office be filled and for what term?

To Hon. Byron Butler, County Judge, Taylor County, Perry, Florida:

In my opinion, if you should tender your resignation after March 20th of this year, or at any time prior to the general election in 1942, the Governor may accept the resignation, and is required by the Constitution to appoint your successor only until the regular election and qualification of a successor in the ensuing general election.

It is only in cases where a vacancy in an elective office occurs between a general election and the end of a term, that the Governor may appoint for the unexpired term. For instance, if a vacancy had occurred between the election in 1940 and the following Tuesday after the first Monday in January 1941, the appointment could have been made only for the term ending on the latter date, or until a successor was appointed and qualified, under a new appointment, which should have been only until the next general election in 1942, at which time the office would have been permanently filled for the full unexpired term, by the election.

OFFICES, OFFICERS AND RECORDS—Military Leave of Absence

All your questions are fully answered by our Supreme Court, in the case of *State ex rel. Landis v. Taylor*, 108 Fla. 541, 146 So. 549.

The cycle of terms of County Judges, in all the counties of this State began on Tuesday after the first Monday in January 1889, following the general election in 1888. Therefore, the current cycle ends on Tuesday after the first Monday in January 1945. It would be only in case of a vacancy occurring between the general election in 1944 and the ensuing Tuesday after the first Monday in January 1945, that the Governor would be allowed to appoint for the remainder of the term.

If you should resign, and your resignation should become effective prior to March 20th this year, the last date upon which candidates for county elective offices may qualify for the primary of this year, then candidates to succeed you could qualify, and one of them be nominated in this year's primaries, but if the vacancy does not occur until after that date, for qualification of candidates in this primary, then the appointment would be for a period ending with the next general election.

MILITARY LEAVE OF ABSENCE

November 3, 1942.—042-508.

COUNTY SCHOOL SUPERINTENDENT—EFFECT ON BOND

QUESTION: Where the county school superintendent leaves for military service and appointment of acting superintendent is made,

(1) Can the old bond of the duly elected superintendent be released and, if so, upon whose authority?

(2) Should the bond of the acting superintendent run to the Governor or to the County Board?

(3) Should the bond of the acting superintendent be in the same amount as the bond of the regularly elected superintendent?

(4) Where should the bond of the acting superintendent be filed?

To Hon. Colin English, State Superintendent of Public Instruction:

(1) In my opinion of March 28, 1942, re leave of absence by county superintendent—§431 School Code, as amended by §2, Ch. 20970, Acts of 1941 (§230.31 Fla. Stat. '41), I stated that granting a leave of absence did not create a vacancy. As the duly elected superintendent is still the holder of and responsible for the affairs of the office, he must remain bonded as required by statute. There is no statutory authority for releasing the same merely because he is on leave of absence.

(2) Section 137.01, Fla. Stat. '41, provides that each county officer (of which the county superintendent is one) shall give bond "to the Governor of the State of Florida and his successors in office."

(3) This question was also answered by my opinion of March 28, 1942, wherein I stated that on leave of absence by county superintendent the county board should make regulations re selection of a person to perform the duties of his office, and the fixing of bond of the acting superintendent. While §115.03, Fla. Stat. '41, which provides for the bond of a deputy, is not applicable to the present question because the county superintendent has no authority to appoint deputies, it might well serve as a yard stick to the county board in adopting such regulations.

(4) The county superintendent being classed as a school official, the acting county superintendent should be considered in the same classi-

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fication and not as a school employee, and his bond should be filed with the Secretary of State, as provided by §237.31(6) Fla. Stat. '41 (§14(6), Ch. 20970, Acts of 1941).

MILITARY LEAVE OF ABSENCE

June 3, 1942.—042-277.

COURT REPORTERS—SERVICE IN WAAC

QUESTION: An Official Court Reporter is making application for officers training in the newly organized WAAC and has applied for leave of absence under Chapter 20718, Acts of 1941. Do the statutes of Florida authorize the Governor to grant such leave?

To Hon. Spessard L. Holland, Governor:

An Official Court Reporter is an officer appointed by the Governor and holding office at the pleasure of the Governor.

Section 1 of Chapter 20718, as amended by Chapter 20863, Acts of 1941, provides that all County and State officers, and who are officers or enlisted men in certain military organizations, "or officers or enlisted men in any other class of the militia" shall be entitled to leave of absence under the conditions set forth in the Act.

The Supreme Court of Florida, in an Advisory Opinion to the Governor, rendered May 12, 1942, unanimously held that a person holding a civil office under the Governor of this State does not, ipso facto, vacate the office by entering into the service of the armed forces of the United States, and that the Legislature may secure to an officer his tenure in office, as it did in the enactment of Chapter 20718, supra, during the time of his military service with the paramount sovereign government, within the term for which he was elected or appointed.

In my opinion, therefore, the WAAC, while not specifically designated in the statute—not being created at the time—is a "class of the militia" or, "branch of the Army of the United States" within its purview, and that your authority with reference to the granting or withholding of leave of absence to a female Court Reporter who enters "active military service" which signifies "active duty with any branch of the Army of the United States," is the same as that with respect to other State and County officials who are without statutory powers to name deputies; that is to say, that leave of absence may be granted or withheld at your discretion, and that, if granted, you should appoint, upon recommendation of the Circuit Judges of the circuit involved, an Acting Court Reporter to perform the duties of the office during the term of the military service of the regularly appointed and incumbent Court Reporter on leave.

In view of the further fact that the officers in question hold at the pleasure of the Governor, the statutes themselves are effectual to preserve in the Governor ultimate control, in order that he may see that the laws of the State are faithfully executed and that as to this particular class of officers, Chapter 20718 need not be considered as materially affecting the executive powers.

MILITARY LEAVE OF ABSENCE

May 8, 1941.—041-247.

EMPLOYEES—STATE—SALARY

QUESTION: Is there a State or Federal law requiring payment of salary for any period of employees of institutions under the management

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of the Board of Control, when such employees are called into military service?

To Hon. J. T. Diamond, Secretary, Board of Control:

There is no Federal Law requiring such payment. Section 8 of the Federal Selective Training and Service Act of 1940 provides for the re-employment of persons inducted into military service under that Act upon completion of their period of training, but the re-employment provision applies only to persons in the employ of the United States Government, its territories or possessions, and the District of Columbia, and to persons in the employ of a private employer, and does not seem to apply to the State; but there are no provisions in the Federal Act requiring the payment of the salary of persons called into service for any period after they have left the employment.

There are several statutes in Florida relating to leaves of absence of officers and employees of the State who are called into military service. Sections 465 to 470, inclusive, Compiled General Laws of 1927, provide for leaves of absence to officers of the State to serve in military service, but there is no provision for paying any salary during such period of service. Section 2038, Compiled General Laws of 1927, provides that officers and employees of the State who are members of the Florida National Guard shall be entitled to leaves of absence without loss of pay for not more than seventeen days, while engaged in field or coast defense exercises, or other training ordered under the Florida National Guard Act. Section 470(1), Compiled General Laws, 1940 Supplement, provides that officers and employees of the State who are commissioned Reserve Officers in the United States Military or Naval Service, shall be entitled to leave of absence without loss of pay for not more than seventeen days in any one annual period, while engaged in field or coast defense exercise, or other training ordered under the provisions of the United States Military or Naval training regulations for Reserve Officers, when assigned to active duty pursuant to their provisions.

I call your attention to the fact that in the present session of the State Legislature, there have been introduced a number of bills providing for leaves of absence under certain conditions to officers and employees of the State who are called into military service, with certain provisions relating to pay. One of these bills provides for the payment of salary for a period of thirty days after the call into military service. None of these bills, however, has yet been enacted into law.

MILITARY LEAVE OF ABSENCE

August 5, 1942.—042-380.

EMPLOYEES—STATE—SERVICE IN MERCHANT MARINE

QUESTION: Would an officer or employee joining the Merchant Marines be entitled to the privileges mentioned in Chapter 20,718, Acts of 1941, providing for leave of absence of public officials for military service?

To Hon. J. M. Lee, Comptroller:

Section 2 defines active military service as follows:

"The term 'active military service' as used in this act, shall signify active duty in the Florida defense force or Federal service in training or on active duty with any branch of the army of the United States, United States navy, the marine corps of the United States, the coast guard of the United States and service of all officers of the United States public

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health service detailed by proper authority for duty either with the army or navy . . ."

In Section 1 it is provided that leave may be granted to state officers and employees who—

"hold office under the government of the State of Florida and are officers either in the defense force, national guard, naval militia, marine corps, unorganized military, United States army reserve, United States navy reserve, United States marine corps reserve, United States coast guard reserve or officers in any other class of militia . . ."

I am of the opinion that these two sections should be read in pari materia.

Upon receipt of your letter I wired the Chief of Navigation, Washington, D. C., as follows:

"Is Merchant Marine a branch of United States Navy? If not is it under supervision of United States Navy? Need this information in construction of a leave of absence statute . . ."

I am today in receipt of the following reply:

"Merchant Marine is not repeat not a branch of the United States navy. It is administered by war shipping administration. However many officers and men of Merchant Marine are members of United States Naval Reserve. Bureau of Naval Personnel Navy Dept."

Obviously the state officer or employee in the Merchant Marine is not in any of the designated classes of our armed service unless it could be said that they "are officers in any other class of the militia." In my opinion this has reference to armed forces and is not broad enough to include the Merchant Marine. Personally, I feel that the Merchant Marine is rendering an invaluable service to our country in time of war and its importance is not to be underestimated. However, as much as I should like to construe this leave of absence statute as applying to any officer or employee joining the same, I am limited by the manner in which the Legislature has worded this Act.

I therefore can only say that an officer or employee joining the Merchant Marine is not entitled to the privileges mentioned in Chapter 20,718, Acts of 1941.

MILITARY LEAVE OF ABSENCE

December 31, 1942.—042-582.

EMPLOYEES—STATE—SERVICE IN WAVES OR WAACS

QUESTION: Is a state or county employee, who is granted leave of absence under Section 7 of Chapter 20718, Acts of 1941, to join the WAACS or the WAVES, performing active military service as defined by Section 2 of said chapter, and entitled to receive thirty days' pay?

Is a state or county official or employee, who has been granted a leave of absence for the purpose of induction as a private in the armed forces, entitled to thirty days' compensation as prescribed by Section 1 of said Act?

To Hon. Colin English, State Superintendent of Public Instruction:

By opinion of February 5, 1942, construing Section 7 of said Act (Section 115.14 Fla. Stat. '41), I held that while the granting of leave of absence was discretionary with the employing authority, once leave of absence is granted for military reasons, the person to whom it is granted automatically becomes entitled to all rights and privileges prescribed, including compensation for the first thirty days' leave of absence.

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It is my opinion that such employee given such leave of absence and who is actually inducted as a WAAC or a WAVE comes within such definition of active military service and is entitled to thirty days' pay as prescribed by the Act.

It is my opinion that said Section 1 does not limit payment of compensation to those who were officers or enlisted men in the services mentioned therein at the time of passage of said Act; but rather, it directs payment of full pay for the first thirty days of any leave of absence to all state and county officials holding office under the state government, all county school officers, and all municipal officials in the state, including those who were at the passage of said Act officers or enlisted men in any of the services therein specifically mentioned, who perform active military service, without regard to whether such active military service was performed as a private, or otherwise.

Section 7 of said Act, subject to leave of absence being granted by the employing authority, extended the same rights and privileges to "all employees of the State of Florida, and the several counties of the State of Florida, and of the municipalities and political subdivisions of the State of Florida, as are granted to officials under this law."

MILITARY LEAVE OF ABSENCE

July 8, 1941.—041-361.

ENLISTMENTS PRIOR TO STATUTE—STATE EMPLOYEES

QUESTION: Is Chapter 20718, Laws of Florida, Acts of 1941, retroactive as well as prospective in its application?

To Hon. Ralph Davis, Secretary, Board of Commissioners of State Institutions:

You are advised that we find no authority for the view that the statute in question applies only to officials and employees inducted into the service of the United States subsequent to the effective date of the Act named. On the contrary, it is our opinion that the Act is retroactive as well as prospective in its application.

MILITARY LEAVE OF ABSENCE

August 18, 1941.—041-450.

ENLISTMENTS PRIOR TO STATUTE—STATE EMPLOYEES' RIGHTS

QUESTION: Are men who are drafted under the Selective Training and Service Act of 1940 enlisted men within the meaning of Section 1 of Chapter 20718, as amended by Section 1 of Chapter 20863, Acts of 1941?

To Hon. H. J. Malsberger, State Forester, Florida Forest and Park Service:

Section 1 of Chapter 20718, as amended by Section 1 of Chapter 20863, provides:

"LEAVE TO PUBLIC OFFICIALS FOR MILITARY SERVICE. All State and county officials in the State of Florida, and all others who hold office under the government of the State of Florida, and who are officers or enlisted men either in the Florida Defense Force, the National Guard, the Naval Militia, Marine Corps, Unorganized Militia, United States Army Reserve, United States Navy Reserve, United States Marine Corps Reserve, United States Coast Guard Reserve, or officers

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or enlisted men in any other class of the militia, or county school officers, and all municipal officers in the State of Florida, may, subject to the provisions and conditions hereafter set forth, be granted leave of absence from their respective military service. The first thirty days of any leave of absence to be with full pay and the remainder without pay."

In my opinion men who are drafted under the Selective Training and Service Act of 1940 are enlisted men within the meaning of the above provision. "Enlisted man" is defined in Webster's New International Dictionary, Second Edition, as follows: "In the United States service, a private soldier, seaman, or marine, or non-commissioned officer, as distinguished from a warrant or commissioned officer, the latter two not being technically enlisted." I am able to see no intent expressed in the Act to distinguish between men who voluntarily enlist and those who are called into service under a draft law.

A case in which the court held that a drafted man is within the meaning of the words "enlisted man" is *Watson vs. Sovereign Camp W. O. W.* 116 S. C. 360, 108 S. E. 145.

You also ask in your letter whether Chapters 20718 and 20863 are retroactive so as to apply to several of your employees who were called into active military duty prior to the effective dates of those acts and who were granted seventeen days' leave with pay as provided under former laws.

In an opinion addressed to the Secretary of the Board of Commissioners of State Institutions on July 8, 1941, I stated, "we find no authority for the view that the statute in question applies only to officials and employees inducted into the service of the United States subsequent to the effective date of the act named. On the contrary, it is our opinion that the act is retrospective as well as prospective in its application." You are therefore advised that your employees who were called into active military duty prior to the effective dates of these acts (June 6th in the case of Chapter 20718 and June 12th in the case of Chapter 20863) are entitled to the benefits of those acts if they have been granted leaves of absence as provided in that law, including full pay for the first thirty days of such leaves of absence. Those who were granted seventeen days' leave with pay are of course entitled to only thirteen days' additional pay.

MILITARY LEAVE OF ABSENCE

May 7, 1942.—042-226.

ENLISTMENTS PRIOR TO STATUTE—STATE EMPLOYEES' RIGHTS

QUESTION: Is an employee of the Florida State College for Women, who was drafted and entered military service April 21, 1941, entitled to a leave of absence as authorized by Chapter 20718, Acts of 1941, and the thirty days' pay provided therein?

To Hon. J. T. Diamond, Secretary, Board of Control:

Mr. William Tyler is an employee of the State of Florida and therefore, is entitled to the benefits of Chapter 20718, which leaves to the discretion of the employing authority, in this case the Board of Control, whether or not such employee should be granted a military leave of absence.

As I stated in an opinion to Hon. Ralph Davis, Secretary to the Board of Commissioners of State Institutions, on July 8, 1941, I "find

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no authority for the view that the statute in question applies only to officials and employees inducted into the service of the United States subsequent to the effective date of the Act named. On the contrary, it is our opinion that the act is retrospective as well as prospective in its application."

Mr. Tyler would be entitled to the full benefits of Chapter 20718 even though he entered military service prior to the effective date of that act, if the employing authority, in its discretion, finds that he should be granted a leave of absence under the above cited statute.

MILITARY LEAVE OF ABSENCE

September 22, 1942.—042-458.

FLORIDA CRIPPLED CHILDREN'S COMMISSION—EMPLOYEES

QUESTION: The Florida Crippled Children's Commission has a nurse in its employ who has joined the Navy and has requested an additional month's salary. What is the policy of the state in regard to paying a month's salary to full-time State employees who enter the armed forces of the United States?

To Dr. Terry Bird, Director of Services, Florida Crippled Children's Commission:

The policy of the state in this regard is found in Chapter 20718, Laws of Florida, Acts of 1941, wherein it is provided that employees of the State may, in the discretion of the employing authority of such employee, be granted leave of absence for military service. It is further provided in this law that the first thirty days of said leave of absence shall be with full pay.

Active military service is defined in this act as being active duty in the Florida Defense Force or Federal Service in training or on active duty with any branch of the Army of the United States, the United States Navy, etc.

A nurse in the employ of your commission is, in my opinion, a state employee and may be granted a leave of absence by your commission for active duty in the Navy. Whether or not you grant this leave of absence is discretionary with your commission. However, if this leave of absence is granted then the employee is entitled to the first thirty days' of said leave of absence with full pay.

MILITARY LEAVE OF ABSENCE

August 29, 1941.—041-490.

FLORIDA STATE HOSPITAL—EMPLOYEES

QUESTION: Are employees of the Florida State Hospital, entering the military service of the United States by draft, enlistment or as reserve officers, entitled to thirty days' pay if their period of military service began prior to the passage of Chapters 20718 and 20863, Acts of 1941?

To Hon. J. H. Therrell, Superintendent, Florida State Hospital:

Your inquiry as to whether or not these statutes are retroactive has been answered in our opinion dated August 18, 1941, addressed to the State Forester, and our opinion dated July 8, 1941, addressed to the Board of Commissioners of State Institutions, in which opinions

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we said, "We find no authority for the view that the statute in question applies only to officials and employees inducted into the service of the United States subsequent to the effective date of the act named. On the contrary, it is our opinion that the act is retrospective as well as prospective in its application." This statement applies alike to Chapters 20718 and 20863, Acts of 1941.

We also call your attention to Section 470(1), Compiled General Laws of Florida, 1940 Supplement (Section 1 of Chapter 17975, Acts of 1937), which reads as follows:

"Commissioned reserve officers in United States military or naval service ordered to active duty status. All officers or employees of the State of Florida, or of the several counties or municipalities of this State, who are commissioned reserve officers in the United States military or naval service, shall be entitled to leave of absence from their respective duties, without loss of pay, time or efficiency rating, on all days during which they shall be engaged in field or coast defense exercise or other training ordered under the provisions of the United States military or naval training regulations for reserve officers when assigned to active duty pursuant to their commissions, provided that leaves of absence granted as a matter of legal right under the provisions of this section shall not exceed seventeen days in any one annual period: Provided, further, that leaves of absence for additional or longer periods of time without pay for assignment to duty with Civilian Conservation Corps units or other functions of a military character may be granted in the discretion of employing or appointing authority of any State, county or municipal employee and when so granted shall have the force and effect of other leaves of absence authorized by this section."

We likewise call your attention to Section 2038, Compiled General Laws (Section 2, Chapter 12089, Acts of 1927), which provides:

"Leaves of absence for governmental employees. All officers and employees of the State of Florida and of the several counties and municipalities within the State of Florida, who are members of the Florida National Guard, shall be entitled to leave of absence from their respective duties, without loss of pay, time or efficiency rating, on all days during which they shall be engaged in field or coast defense exercises or other training ordered under the provisions of this Chapter: Provided, that leaves of absence granted under the provisions of this section shall not exceed seventeen days at any one time."

It is our opinion therefore that the employees of the hospital who were called into active military duty prior to the effective dates of these Acts (June 6th in the case of Chapter 20718 and June 12th in the case of Chapter 20863) are entitled to the benefits of these Acts if they have been granted leaves of absence as provided in said laws, including full pay for the first thirty days of such leave of absence. Those who were granted seventeen days leave with pay under Sections 470 and 2038, supra, are of course entitled only to thirteen days additional pay.

MILITARY LEAVE OF ABSENCE

September 25, 1941.—041-557.

FLORIDA STATE HOSPITAL—EMPLOYEES

QUESTION: Are employees entitled to leave of absence with pay for first thirty days upon entering military services of the United States, as provided in Chapter 20718, Acts of 1941?

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To Hon. J. H. Therrell, Superintendent, Florida State Hospital:

Chapter 20718, Acts of 1941, contemplates that such employees may in the discretion of the employing authority of such employees be granted leave of absence under the terms of said Act, and upon such leave of absence being granted, said employees shall enjoy the same rights and privileges as are granted to officials under the Act, which include full pay for the first thirty days of such leave of absence, provided such leave of absence be granted to the employees so that such employees may perform active military service.

The term "active military service," as used in the Act, signifies active duty in the Florida defense force or Federal service in training or on active duty within a branch of the Army of the United States, the United States Navy, the Marine Corps of the United States, the Coast Guard of the United States, and services of all officers of the United States Public Health Service detailed by proper authority for duty either with the Army or the Navy.

If registered nurses and registered medical technicians or physiotherapists employed by the Florida State Hospital are granted leave of absence under the terms of the aforesaid Act for the purpose of performing active military service with any of the foregoing branches, then it is my opinion that such nurses and technicians or physiotherapists are entitled to full pay for the first thirty days of said leave of absence.

This full pay for the first thirty days of such leave of absence is nothing more than salary or wages. It is, in fact, similar in nature to a vacation with pay, and such payments should be made from the regular appropriation for salaries and wages. It is true that your appropriation for salaries and wages may not have been for an increased amount sufficient to cover such items; however, it is my opinion that it is the duty of the department head to handle the salaries and wages of his employees in such a manner as to make available from such appropriation an amount sufficient to cover these emergency items. It seems to me that this might be done by temporary reductions in salaries and wages, especially of those replacing the ones to whom leaves of absence have been granted, or perhaps by making such replacements only after a short lapse of time.

MILITARY LEAVE OF ABSENCE

October 15, 1941.—041-576.

MOTOR VEHICLE DEPARTMENT—EMPLOYEES

QUESTION: May employees of Motor Vehicle Department be granted leaves of absence for Military Service under Chapter 20718, Acts of 1941?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 1 of Chapter 20718, Acts of 1941, as amended by Chapter 20863, Acts of 1941 provides as follows:

"LEAVE TO PUBLIC OFFICIALS FOR MILITARY SERVICE. All State and County officials in the State of Florida, and all others who hold office under the government of the State of Florida, and who are officers or enlisted men either in the Florida Defense Force, the National Guard, the Naval Militia, Marine Corps, Unorganized Militia; United States Army Reserve, United States Navy Reserve, United States Marine Corps Reserve, United States Coast Guard Reserve, or officers or enlisted men in any other class of the militia, or county school officers, and all municipal officials in the State of Florida, may, subject to the provisions

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and conditions hereafter set forth, be granted leave of absence from their respective offices and duties to perform active military service. The first thirty days of any leave of absence to be with full pay and the remainder without pay."

Section 7 of the Act provides as follows:

"**EMPLOYEES.** All employees of the State of Florida, and of the several counties of the State of Florida, and of the municipalities or political subdivisions of the State of Florida may, in the discretion of the employing authority of such employee, be granted leave of absence under the terms of this Act, and upon such leave of absence being granted, said employee shall enjoy the same rights and privileges as are hereby granted to officials under this Act, in so far as may be."

It is therefore my opinion, that it is within your discretion to grant an employee leave of absence as provided for in the Act, upon his being called into the military service of the United States, and if such leave of absence is granted, such employee then becomes entitled to pay during the first thirty days of such leave of absence.

I believe the leave of absence contemplated by the Act should either be granted or refused at the time of or prior to the time the employee terminates his service with the State. However, I see no reason why you could not now grant such leave of absence and make the same retroactive.

MILITARY LEAVE OF ABSENCE

August 6, 1942.—042-381.

PROBATION OFFICERS—ACTING—SALARY

QUESTION: May W. Ira Hazlett, as Acting Chief Probation Officer of the Juvenile and Domestic Relations Court, appointed by the Governor to temporarily succeed as acting appointee, Marshall Battle, Chief Probation Officer of said Court, which latter has been granted leave of absence for military service, draw a salary under his appointment during the period of time when the incumbent, Marshall Battle, receives the leave of absence thirty day salary allowance?

To Hon. R. A. Gray, Secretary of State:

In my opinion, the acting appointee is entitled to his salary compensation as of the time when he duly qualifies under such appointment and begins the service, to which the appointment applies. The thirty day compensation allowance, provided by the Legislature for officers and employees of State, County and Municipal governments entering the military service, is a statutory gratuity provision and the rights of an acting successor to any such leave of absence incumbent, have no dependence upon or relation to this statutory gratuity and exist by virtue of the legal right in the acting appointee to receive compensation for official services upon the rendition of same, after due qualification to an official place.

Of course, the Governor, in appointing an acting officer, may make his appointment subject to no compensation for services rendered during the thirty day statutory leave pay period of the incumbent, but unless the Governor does make some reservation or restriction in the appointment, the right to be paid, as above set forth, would prevail.

OFFICES, OFFICERS AND RECORDS—Military Leave of Absence**MILITARY LEAVE OF ABSENCE**

July 1, 1941.—041-359.

RE-EMPLOYMENT—STATE EMPLOYEES

QUESTION: Is there any state or federal law relating to the re-employment of state, county or municipal employees who are called into military service?

To Hon. L. T. Crews, Medical Detachment, Station Hospital, Camp Blanding, Fla.:

Section 7 of the Selective Training and Service Act of 1940, passed by Congress, provides for the re-employment of persons who leave positions in the employ of the Federal Government and private employers after the period of training is completed. The only provision as to employees of state and political subdivisions of states is the provision that "if such person was in the employ of any state or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority status, and pay." At the 1941 session of the Florida Legislature two Acts (Chapter 20718 as amended by Chapter 20863) were passed providing for leaves of absence to State and County officials, county school officers and municipal officers who enter into active military service. Sections 7 and 8 of Chapter 20718 relate to employees and provide:

"Section 7. **EMPLOYEES.** All employees of the State of Florida, and of the several counties of the State of Florida, and of the municipalities or political subdivisions of the State of Florida may, in the discretion of the employing authority of such employee, be granted leave of absence under the terms of this Act, and upon such leave of absence being granted, said employee shall enjoy the same rights and privileges as are hereby granted to officials under this Act, in so far as may be.

"Section 8. **ADOPTION OF FEDERAL LAW FOR EMPLOYEES.** The provisions of Section 8 of Chapter 720 Acts of Congress of the United States, approved September 16, 1940 (Title 50 App. Section 308, U.S.C.A.), in so far as it relates to the re-employment of public employees granted a leave of absence on active military duty under this Act, shall be applicable in this State and the refusal of any State, County, or municipal official to comply therewith shall subject him to removal from office."

I call your attention also to Chapter 20909, enacted by the 1941 State Legislature, providing for the extension of teachers certificates on account of military service.

Under these new statutes, therefore, a public employee of the class described in the statutes is entitled to re-employment at the end of his active military duty if the employing authority of the employee in question has duly granted him a leave of absence.

MILITARY LEAVE OF ABSENCE

March 27, 1942.—042-141.

SHERIFF—RIGHTS

QUESTION: What are the rights of State and County officers under Florida statutes providing for leaves of absence to such officers entering military service?

To Hon. Hugh Culbreath, Sheriff, Hillsborough County, Tampa, Florida:

Chapter 7393, Acts of 1917, being Sections 465 to 470, inclusive, Compiled General Laws, makes it mandatory that a county official called into

OFFICES, OFFICERS AND RECORDS—Military Leave of Absence

the Army of the United States for active service, be given a leave of absence by the Governor after an application from such official therefor for the period of time during which such officer shall be retained in such military service, provided that the leave of absence so granted shall not extend beyond the term of office of such official. However, in my opinion the mandatory duty upon the Governor to grant such leave imposed by the quoted statute, has been modified by Chapter 20718, Laws of Florida, Acts of 1941, in that part providing as follows:

"Application for such leave of absence shall be made to the Governor of the State of Florida and *may be granted or denied* by the Governor in his discretion as the public interest may require."

It is your duty under these statutes to make application for your leave of absence to the Governor, and if it is granted, you then are subject to the following:

(1) You should appoint a capable and competent deputy to take over and perform the duties of your office during your effective leave of absence. Your official bond continues in full force during the remainder of your term of office, and you continue liable thereunder for the acts of your deputies, just as you would had no leave of absence been granted.

(2) The deputy appointed by you to serve during your leave of absence under such appointment is required to furnish good and sufficient bond in a sum of not more than one-half the amount of your official bond, to be conditioned upon the faithful performance by him of the duties assumed.

(3) The deputy appointed by you may perform all of the duties of your office, signing all official papers and documents, but doing it in your name, by him as deputy.

(4) Upon your return from such military service during your term of office, you are entitled to be immediately reinstated.

MILITARY LEAVE OF ABSENCE

March 27, 1942.—042-145.

STATE PLANT BOARD—EMPLOYEES—PART TIME

Question: Has the State Plant Board authority to pay thirty days' compensation upon the granting of a military leave of absence to a nursery inspector who is employed part of the time throughout the year; that is to say, about fifteen days each month throughout the year?

To Hon. J. T. Diamond, Secretary, State Plant Board:

Chapter 20718, Laws of Florida, 1941, makes the granting of a military leave of absence discretionary with the employing authority, but if the leave of absence is granted the Act provides "the first thirty days" of the leave of absence is to be "with full pay and the remainder without pay." The Act relates to "employees of the State of Florida" and, therefore, as I pointed out in my opinion of October 8, 1941, to the State Board of Control, part-time employees fall within the all inclusive terms of the Act.

In my opinion, however, the Act does not contemplate the payment of part-time employees for thirty days at the daily wage rate. It rather contemplates the payment of such part-time employees on the basis of the time such employee would normally work during a thirty-day period.

In the case of the nursery inspector you mentioned, who is employed at a salary of five dollars per day, and who works on the average fifteen

OFFICES, OFFICERS AND RECORDS—Military Leave of Absence

days each month during the year, my opinion is that the State Plant Board would be authorized to pay him seventy-five dollars upon granting him a military leave of absence.

MILITARY LEAVE OF ABSENCE

April 2, 1942.—042-153.

STATE TREASURER—EMPLOYEES

QUESTION: Are employees of the State Treasurer's office entitled to the benefits of the 1941 leave of absence statute?

To Hon. J. Edwin Larson, State Treasurer:

Employees of the State Treasurer's office are state employees and, as such, are entitled to the benefits of the 1941 leave of absence statute referred to above.

MILITARY LEAVE OF ABSENCE

September 29, 1942.—042-467.

STATE WELFARE BOARD—EMPLOYEES

QUESTION: Is an employee on leave of absence for active military service under Chapter 20718, Acts of 1941, entitled to be re-employed upon his discharge from said military service at the salary paid him at the time he took said leave of absence or should he be re-employed at the new salary fixed by the employing authority, said salary having been reduced during the employee's absence?

To Mr. William J. DeHoff, Attorney, State Welfare Board, Jacksonville, Florida:

Chapter 20718, Acts of 1941 provides that the provisions of Section 8 of Chapter 720, Acts of Congress of the United States approved September 16, 1940, (title 50 App. Section 308, U.S.C.A.) insofar as it relates to the re-employment of public employees granted a leave of absence for active military duty under the Florida Act shall be applicable in the State of Florida.

The Act of Congress referred to in this regard declares it to be the sense of Congress that employees of any state or political subdivision thereof having been absent by leave of absence for military service should be restored to their former position or to a position of like seniority, status and pay.

Inasmuch as the Legislature of Florida has adopted the provisions of the Act of Congress referred to it is my opinion that state employees granted leave of absence for active military service under the Florida Act should be re-employed at the same salary such employee was receiving at the time he was granted said leave of absence. However, if there has been a general salary reduction applicable to other employees similarly situated then such re-employment may be at the reduced salary. It is my opinion that the employing authority could not single out the particular employee's job and reduce the salary for that position and thereby affect the rights and status of the employee who is on leave of absence for military duty by the reduction in salary. If it is to be carried forward and affect such employees it must be the result of a scaling down of salaries generally for economic or other reasonable purposes.

OFFICES, OFFICERS AND RECORDS—Military Leave of Absence
MILITARY LEAVE OF ABSENCE

March 5, 1942.—042-103.

STATUTE—SCOPE

QUESTION: What is the application of the 1941 leave of absence statute to employees of the State Government who are not officers of the State or County?

To Hon. Spessard L. Holland, Governor:

All employees of the State, of the several counties of the State, of the municipalities or political subdivisions of the State, and all county school officers, may in the discretion of the employing authority of such employee, be given a leave of absence from their respective duties, to perform military service in any of the following organizations or groups:

- (1) Florida Defense Force.
- (2) National Guard.
- (3) The Naval Militia.
- (4) The Marine Corps.
- (5) The unorganized Militia.
- (6) The United States Army Reserve.
- (7) The United States Navy Reserve.
- (8) The United States Marine Corps Reserve.
- (9) The United States Coast Guard Reserve.
- (10) In any other class of the militia, or branch of the military service of the United States.

This leave of absence is in order that they might be able to perform active military service through such affiliation.

Upon such leave of absence being granted, such employee shall be entitled, subject to the reservation hereinafter set forth, to the following:

(1) To have preserved for him or her all seniority rights, efficiency ratings, promotional status, and retirement privileges during his or her leave of absence, provided he or she is reinstated to the employment held by him or her when the leave of absence was granted.

The reservation to which the entitlement in this paragraph is dependent, is created by the language in Section 7 of Chapter 20718 aforesaid, as follows: "insofar as may be." Because of this language, it is my opinion that such employee does not enjoy an absolute right to reinstatement by a successor employer, but that such reinstatement rights are dependent upon conditions existing with the successor employer at the time of his or her return, and if because of such conditions the successor employer is unable to reinstate the employee, then because of the language, "insofar as may be," as applied to the interpreting and meeting of such condition, the successor employer may for cause decline the reinstatement.

It is my opinion that the language "insofar as may be" as used in Section 7 of the Act, is intended to leave with the successor employer a field of discretion to be used in determining whether or not reinstatement may be had.

The "leave of absence" as to employees begins at time of entering upon service and continues beyond the term of the granting employer, and for the period of the employee's military service and a time not to exceed thirty days immediately next succeeding the date of release from active service. My reason for holding that the employee's "leave of absence" time extends through successor employers, is because of the

OFFICES, OFFICERS AND RECORDS—Military Leave of Absence

definition given in the Act to the language "period of active military service" without any limitation being placed under its provision on the employee's leave. The period of active military service under the granted and effective leave of absence for the purpose of computation to determine whether such person may be entitled to retirement under the laws of the State of Florida, where retirement acts are involved, shall be deemed continuous service in the office of the granting employer.

(2) The employee given such leave of absence is deemed to have his leave of absence extended by successor incumbents to his original employer's office, and it would be the duty of such successor incumbent to extend the period of the leave of absence as long as the eligible service existed, although it is not the absolute duty of a successor incumbent employer to reinstate, the modifying term "insofar as may be" being the applicable provision as to such reinstatement. Records should be kept by granting employers of the leaves of absence given, and these should be preserved by their successors in office for the protection of the employee's conditional rights of re-employment and his or her other rights under the Act.

(3) The employee is exempt from contributions to retirement funds while on such leave.

(4) If time for reinstatement arrives during a successor employer's incumbency, and if for good cause it is not granted, all continuing privileges cease, although accrued rights stand as then fixed.

(5) Good cause must exist to support a successor employer's refusal to reinstate a "leave of absence" employee. The Act does not attempt to define what this "insofar as may be" condition to reinstatement, should consist of.

(6) Because of the provisions of Section 8 of the Act, a leave of absence employee has an absolute right to reinstatement from his original employer, to his former position or a position of like seniority status and pay, if his return is during the incumbency of such original employer.

MILITARY LEAVE OF ABSENCE

August 21, 1942.—042-410.

TAX COLLECTOR—SALARY

QUESTION: (1) Is the Honorable Hayes Wood, former Tax Collector of Dade County, who has been granted leave of absence to enter military service, entitled to receive thirty days pay under the provisions of Chapter 20178 and 20863, Acts of 1941?

(2) If you hold that he should, would this be deducted from the \$7500.00 limitation placed on the amount that should be received by the Tax Collector in any one year?

(3) If you should hold that the amount that was paid him for this leave of absence would not be deducted from the \$7500.00 limitation, then when would the present Tax Collector start paying into the excess fee fund?

(4) Should he begin at \$5000.00 on only that part that he personally receives or should he start paying as soon as the net income of the office is \$5000.00?

(5) Does this Act apply also to employees of fee offices?

OFFICES, OFFICERS AND RECORDS—Military Leave of Absence

To Hon. J. M. Lee, Comptroller:

(1) This question should be answered in the affirmative.

(2) I am of the opinion that Mr. Wood and the person taking his place should receive the pro rata share of \$7500.00 allowed as compensation to the holder of this office, and that Mr. Wood should receive, in addition thereto, \$625.00 which is a month's salary.

(3) and (4) In an opinion by this office, under date of June 9, 1937, the then Attorney General gave an opinion that I believe fully answers these questions. I have carefully considered the same and concur therein. This opinion may be found in the Biennial Report for 1937-1938, page 106.

(5) I am of the opinion this question should be answered in the affirmative.

MILITARY LEAVE OF ABSENCE

April 21, 1942.—042-196.

VOCATIONAL EDUCATION—EMPLOYEES

QUESTION: Is a person employed in the vocational education of defense workers entitled to an extra month's pay under the provisions of Chapter 20718, Acts of 1941? Such employee is appointed by, and is under the supervision of, the State Superintendent of Public Instruction. Although the funds are supplied by the Federal Government for this purpose, they are disbursed in the same manner as other State funds and such employees are paid by warrant on the State Treasurer.

To Hon. Colin English, State Superintendent of Public Instruction:

The employee you describe is within the purview of Chapter 20718, Acts of 1941, and is entitled to its benefits as an employee of the State.

Two further questions must, however, be answered in connection with the application of this Act. First, it must be determined that the employee is going into active military service which is defined in the Act as being "active duty in the Florida Defense Force or Federal service in training or on active duty with any branch of the Army of the United States, the United States Navy, the Marine Corps of the United States, the Coast Guard of the United States, and service of all officers of the United States, Public Health Service detailed by proper authority for duty either with the Army or the Navy." This question will have to be answered on the basis of the facts of each particular case.

The second question is whether the funds supplied by the federal government for the vocational education of defense workers may be used to pay an extra month's salary under the provisions of Chapter 20718. Since the federal government supplies the funds for the vocational education of defense workers, it may control the spending of those funds and may provide conditions governing their use. Inasmuch as the extra month's pay would have to be paid from those funds, you should ascertain from the U. S. Office of Education whether there is any federal inhibition against such use of those funds.

POWERS AND DUTIES OF STATE OFFICERS AND AGENCIES

August 27, 1941.—041-492.

BOARD OF CONSERVATION—PURCHASE OF AUTOMOBILE

QUESTION: State Board of Conservation requests payment of one Chevrolet 1941 Coupe, with box, at \$544.50, invoice bearing statement,

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"Approved by the Budget Commission for purchase June 23, 1941." Comptroller finds no authority for purchase of this automobile in the General Appropriation Act of 1941, Chapter 20980. Is the State Board of Conservation authorized to purchase this automobile?

To Hon. J. M. Lee, Comptroller:

This particular automobile is for the State Board of Conservation Geological Survey and was approved prior to the fiscal year ending June 30, 1941. Chapter 20896 is the applicable law with reference to the purchase of motor vehicles. I find under Section 2 that there is authority for the purchase of this automobile, provided:

"such purchases are within legislative appropriations therefor. Both motor vehicle appropriations and appropriations for necessary and regular expense of the proposed purchaser, may be considered in determining whether or not the purchase is within such appropriations."

I find no specific item with reference to the purchase of automobiles in the Appropriation Act. However, I find an item for necessary and regular expense of \$9,900.00. I have examined the budget which I think it proper to do in order to determine what made up necessary and regular expense and whether or not the department received from the Budget Commission and the Legislature what it had requested. I find on page 130 of the Budget Report for the Biennium 1939-1940, an item "Cars—trade-in . . . \$600.00." I understand that the balance of \$544.50 for the Chevrolet is balance due after a trade-in.

I, therefore, am of the opinion that under the above facts, the Budget Commission was fully within its authority in approving such purchase and under the law, the State Board of Conservation is, therefore, authorized to purchase said automobile and it is in order for you to issue your warrant therefor.

I might also add that the Geological Survey's budget for 1941-1942 shows an identical item. The full amount requested was recommended by the Budget Commission and the appropriation was for the full amount recommended.

My approval is subject to the proviso that the Executive Officer of the Department certify that this motor vehicle equipment is necessary for the use of the Department in carrying out its departmental purposes.

For the information of the Department Executive Officer and as a matter of declaration of legal interpretation involved, the opinion here expressed does not mean that this office will at any time approve the purchase of automobiles or motor vehicle equipment for the personal use of officers and employees of State agencies, departments or institutions on the ground that such purchases can be classified as necessary and regular expenses where the motor vehicle equipment to be used is not for the purpose of carrying out departmental or institutional purposes, because I believe that the legislative intent as expressed in Chapter 20896, Laws of 1941, is to prohibit any such purchases or any such classification.

POWERS AND DUTIES OF STATE OFFICERS AND AGENCIES

August 14, 1941.—041-491.

BOARD OF CONSERVATION—PURCHASE OF TRUCK

QUESTION: In the report and recommendations of the Budget Commission to the Legislature of 1941, in the departmental statement

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of the State Board of Conservation, Geological Survey, is an item for "one truck and portable drilling equipment with supplies—\$3,500.00." This item is among those included in the total request by the Budget Commission for special field investigation for the biennium—\$27,200.00. Chapter 20980, Acts of 1941, the general appropriation act, makes an appropriation for the State Board of Conservation, Geological Survey, for special field investigation for the biennium of \$27,200.00. Is this a specific appropriation for the purchase of an automobile, as required in Section 4 of Chapter 20896, Acts of 1941?

To Hon. F. C. Elliot, Secretary Budget Commission:

In connection with the prohibition of this statute, we must consider that the appropriation Acts of 1933 and prior years gave specific authorization and made specific appropriation for each item requiring disbursement of State funds; and that the Legislature of 1935 changed its policy in making appropriations, which it has continued through succeeding sessions, including the 1941 session, by generally appropriating only funds for salaries, necessary and regular expenses, and special expenses, and omitting from the appropriation Acts specific appropriation for specific items.

The request and recommendation to the Legislature by the Budget Commission, having included an item for a truck in its special expense item for field investigations by the Conservation Department, Geological Survey, and the Legislature having appropriated the total amount recommended, it is my opinion that the purchase and disbursement of State funds for the truck requested, the amount of which is within the 1941 appropriation as recommended, is authorized and proper.

POWERS AND DUTIES OF STATE OFFICERS AND AGENCIES

May 15, 1941.—041-257.

BOARD OF HEALTH—PURCHASE OF AUTOMOBILE

QUESTION: Is the State Board of Health within its legal rights to proceed with the purchase of three automobiles, two from U. S. Public Health Service Funds and one from Drug Store Inspection Funds, same being replacements and a part of the Board's budgets?

To Dr. W. H. Pickett, State Health Officer:

In reply I wish to advise that under date of March 4, 1941 (041-106), I rendered an opinion with reference to the purchase of motor vehicles by the State Hotel Commission; same to be paid out of the funds of the State of Florida. This opinion is applicable to the purchase of an automobile by you from State funds.

I have examined the letter from your auditor citing budget sections where the items for the replacement of automobiles are set up. I have also examined the appropriation act passed by the 1939 Session of the Legislature and I do not find a specific appropriation directly and expressly authorizing the purchase of a motor vehicle out of funds of the State of Florida. Therefore, as to the purchase of an automobile from Drug Store Inspection funds, I am of the opinion that my ruling of March 4th would bar this purchase.

Since the other two automobiles are to be purchased from money derived from United States Public Health Service funds and since this money was appropriated by the Federal Government and sent to the State of Florida after it had approved your budget, I am of the opinion

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that Chapter 13810, Acts of 1929, mentioned in my opinion of March 4th, is not applicable to the purchase of the two automobiles out of money received from the United States Public Health Service.

POWERS AND DUTIES OF STATE OFFICERS AND AGENCIES

August 7, 1941.—041-437.

BOARD OF HEALTH—PURCHASE OF TRACTOR

QUESTION: Has the State Board of Health authority to purchase a tractor for its tuberculosis trailer, using a vehicle presently owned as a part of the purchase price?

To. Hon. G. W. Baltzell, Auditor, State Board of Health:

You are correct in stating that "truck replacement" and "auto replacement," aggregating \$2,100.00, are included in the report of the Budget Commission to the Legislature of 1941 and, therefore, apparently contemplated by that Commission in making its recommendation to the Legislature, although the aggregate of the requests of the department exceeds those actually recommended and covered by the appropriation bill.

However, Chapter 20896, Acts of 1941, provides for the purchase, by the Board of Commissioners of State Institutions, of all motor vehicles for State institutions under its supervision and control, within Legislative appropriations therefor, and by the State Budget Commission, for all State officers, agencies and departments under the supervision of the State Board of Control, also within Legislative appropriations therefor.

The same Act, Chapter 20896, excepts from its operation the Department of Agriculture, the Florida Board of Forestry, the State Road Department, the Florida Industrial Commission, the Railroad Commission, and the State Department of Public Safety. With reference to all other State agencies, the Act prohibits the purchase or contract to purchase any motor vehicle, unless the Legislature shall make specific appropriation authorizing the same.

Chapter 13810, Acts of 1929, is specifically repealed by said Chapter 20896.

Since it cannot be said that the Legislature of 1941 made a specific appropriation authorizing the purchase or contract to purchase motor vehicles by the State Board of Health or any of its departments, I find no authority by which the vehicle you have in mind may be purchased with or without the approval of the State Budget Commission or the Board of Commissioners of State Institutions, or any other Board or Commission, the statute in question prohibiting such purchase or contract to purchase except in the exceptions named.

POWERS AND DUTIES OF STATE OFFICERS AND AGENCIES

May 30, 1942.—042-271.

CLERK OF THE CRIMINAL COURT—REPORT

QUESTION: Is the Clerk of the Criminal Court of Record of Monroe County required to file the report of fee officers under Section 472, Compiled General Laws of 1927, since, under Chapter 19618, Acts of 1939, he is now on a salary basis?

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To Hon. J. M. Lee, Comptroller:

Section 472 is not applicable to the Clerk of the Criminal Court of Record of Monroe County since Section 472 applies to fee officers only and this clerk, now under Chapter 19618, is paid on a salary basis out of the General Revenue Fund of the County.

POWERS AND DUTIES OF STATE OFFICERS AND AGENCIES

August 8, 1941.—041-430.

EVERGLADES FIRE CONTROL DISTRICT—PURCHASE OF TRUCKS

QUESTION: Is it necessary for the Everglades Fire Control District to advertise for bids, or is it proper to secure through personal contact with various firms written bids before placing an order?

To Hon. Guy J. Bender, Chief, Everglades Fire Control District:

There is no authority or direction in Chapter 19274, Acts of 1939, which created the Everglades Fire Control District, that advertisement for bids on purchase of trucks be published.

The Chief of the Fire Control District, under Section 9 of said Act is authorized to purchase equipment and may secure written bids from various firms through personal contact or otherwise, consummating the purchase with the consent and approval of the Commissioners of the District.

I have given due consideration to Chapter 20716, which became a law June 6, 1941, and Chapter 20896, which became a law June 12, 1941, both of which provide in effect that it shall be unlawful for any State officer or employee, agency, department or institution to purchase any motor vehicle to be paid for out of funds of the State of Florida unless the legislature shall make specific appropriation authorizing the same.

In the first instance the Everglades Fire Control District is not an agency or department under the control or supervision of the Board of Commissioners of State Institutions or the State Board of Control and therefore there is no authority under sections 1 or 2 of Chapter 20896 for the purchase of trucks by State Boards therein named for Everglades Fire Control District.

The only statutory authority for purchasing trucks for use by the Fire Control District appears in Section 9 of Chapter 19274 which provides:

"Section 9. The Chief of the Everglades Fire Control District is hereby authorized to establish fire patrols in said district and by and with the approval of the Board of Commissioners of the Everglades Fire Control District may purchase, lease, rent or hire such labor services, teams, equipment or machinery as he may deem necessary and pay therefor such price as may be agreed upon by and with the consent of the Commissioners."

If this authority fails, the very purpose of the Fire Control Act may fail as motor vehicles are absolutely necessary to travel and cover the vast area of the eleven counties of the District for the fighting and control of fires.

It should be noted that Section 4 of said Chapter 19274, as amended by Chapter 20973, Acts of 1941, after appropriating seventy-five thousand dollars annually from the general fund of the State of Florida to

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carry out the fire control purposes of the Act, also specifically authorized the Fire Control District to procure as many additional funds as possible from any department of the Federal Government, which must be deposited in the State Treasury to the credit of the Everglades Fire Control District Fund.

Thus, funds expended for the purchase of trucks may not be funds of the State of Florida so as to bring such purchase under Chapter 20716 and Section 4 of Chapter 20896, Acts of 1941.

Further, Chapter 20973, after providing the continuing annual appropriation of seventy-five thousand dollars for the said Fire Control District, also provides:

"All of which funds shall be available for the use of the Everglades Fire Control District, to be disbursed on requisitions made by the Chief of the Everglades Fire Control District and approved by the Commissioners, against which the State Comptroller is hereby authorized to draw State warrants payable by the State Treasurer and chargeable to said fund . . ."

Section 2 of Chapter 20973 repealed all laws in conflict therewith, and the Act became effective June 14, 1941, eight days subsequent to Chapter 20716, and two days subsequent to Chapter 20896, becoming laws, which indicates that the prohibition contained in said last two legislative Acts against the purchase of motor vehicles without specific appropriation therefor was not intended to and does not apply to the Everglades Fire Control District.

Section 13 of said Chapter 19274 contains a declaration of emergency against fire as a common enemy. The fact that each and every fire to be controlled or extinguished presents a new emergency and may require an unknown amount of funds for the immediate purchase of equipment, which cannot be anticipated and cannot be set up in a budget, and the further fact that said District cannot successfully fight fires by waiting for specific legislative appropriation to purchase trucks necessary to meet emergencies, leads to the conclusion that the legislature in making a continuing appropriation of funds for the Fire Control District and specifically authorizing disbursement of funds for equipment to be purchased by the Chief of the District with the consent and approval of the Commissioners, did not intend that the Fire Control District should be handicapped by the prohibition of Chapter 20716 and Section 4 of Chapter 20896, Acts of 1941, against the purchase of motor vehicles without specific legislative appropriation.

The foregoing is further substantiated by the fact that while Chapter 13810, Acts of 1929, containing almost the same prohibition, was in effect (this Act was subsequently repealed by Chapter 20716 and Chapter 20896, Acts of 1941) that Chapter 19275, Acts of 1939, creating the Fire Control District, declaring the emergency against fire as a common enemy and authorizing the purchase of equipment by the Chief of the District with the consent and approval of the Commissioners, was enacted into law over the Governor's veto.

Chapters 20716 and 20896, Acts of 1941, do not apply to the Everglades Fire Control District.

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March 4, 1941.—041-106.

HOTEL COMMISSION—PURCHASE OF AUTOMOBILE

QUESTION: May the State Hotel Commission purchase automobiles for the use of said Commission?

To Hon. Fred C. Elliot, Secretary to Budget Commission:

Chapter 13810, Acts of 1929, is an Act prohibiting the purchase of motor vehicles by State officers or employees in all cases where no specific appropriation has been made authorizing same. Said Act provides as follows:

"Section 1. That it shall be unlawful for any *State officer or employee* to purchase or contract for the purchase of any motor vehicle for the use of himself or another to be paid for out of funds of the State of Florida or any department thereof unless a specific appropriation directly and expressly authorizing the purchase of such motor vehicle has been made, and it shall be unlawful for the Comptroller of the State of Florida to issue or pay any warrant in violation of this Act. For the purpose of this Act an appropriation for the purchase of motor vehicles shall not be deemed to be expressly made by the Legislature unless an item authorizing the purchase of such motor vehicle in specific terms has been mentioned in the appropriation out of which the same is proposed to be made. This Act shall extend to and include the purchase of motor vehicles of all kinds, provided this Act shall not apply to purchase of trucks by the State Road Department."

This Act applies to State officers or employees. The Supreme Court of Florida has defined a State officer in the case of *McSween v. State Live Stock Sanitary Board of Florida*, 122 So. 239, as follows:

"State 'officer,' as distinguished from employee, is one to whom portion of state's sovereign power is delegated as public trust to be executed in behalf of government with regular tenure, and not to a merely transient, occasional, or incidental employment."

It is my opinion that the State Hotel Commissioner is a State officer within the meaning of the Act.

The State Hotel Commission, created under Chapter 16042, Acts of 1933, is a department of the State Government within the meaning of Chapter 13810, Acts of 1929, and, therefore, said Commission would be restrained from paying for any motor vehicle unless purchased after a specific appropriation directly and expressly authorizing such purchase pursuant to the terms of said Act.

Chapter 19280, Acts of 1939, is an Act appropriating operating expenses of the departments and branches of State Government for the annual periods beginning July 1, 1939, and July 1, 1940. No appropriation is made there for the State Hotel Commission, nor do we find where any other appropriation has been made for said Commission.

The Act expressly exempts from its operation the purchase of trucks by the State Road Department. It must have been the intention of the Legislature for this Act to cover all other departments or branches of the State Government except the purchase of trucks by the State Road Department. This Act obviously restricts any State officer or employee from purchasing, or contracting for the purchase of, any motor vehicle for himself or another, to be paid out of funds of the State, or any de-

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partment thereof, without any express appropriation. The purpose of this Act was to eliminate any reckless, thoughtless or hasty purchase of any motor vehicle, and to place the purchase of same under circumstances most favorable to the State of Florida.

It is, therefore, my opinion that the State Hotel Commission does not have authority to purchase automobiles for the use of said Commission. All opinions in conflict with the above are expressly revoked.

POWERS AND DUTIES OF STATE OFFICERS AND AGENCIES

March 25, 1941.—041-162.

TUBERCULOSIS BOARD—PURCHASE OF AUTOMOBILE

QUESTION: Is the State Tuberculosis Board authorized to purchase a motor vehicle, using for the purchase thereof moneys appropriated to it by the 1939 Legislature?

To Hon. Emmet Safay, Attorney at Law, Jacksonville, Florida:

Chapter 19280, Acts of 1939, which makes appropriation for the salaries of officers and employees of the State and for the current operating expenses of the Departments and branches of the State government, for the annual periods beginning July 1, 1939, and July 1, 1940, makes an allowance to the State Tuberculosis Board as follows:

"Salaries	\$3,415.00
Necessary and Regular Expense	2,325.00
Special	1,760.00"

Chapter 13810, Acts of 1929, which was an Act prohibiting the purchase of motor vehicles by State officers and employees in all cases where no specific appropriation has been made authorizing same, provides in part as follows:

"An appropriation for the purchase of motor vehicles shall not be deemed to be expressly made by the Legislature unless an item authorizing the purchase of such motor vehicle in specific terms has been mentioned in the appropriation out of which the same is proposed to be made."

The appropriation for the State Tuberculosis Board is general, and not specific, and, therefore, it is my opinion that the State Tuberculosis Board cannot use any part of the money appropriated by the 1939 Legislature, for the purpose of purchasing a motor vehicle.

The opinion rendered by this office March 4, 1941, to the Honorable Fred C. Elliot, Secretary to the Budget Commission, covering the purchase of motor vehicles by the State Hotel Commission is applicable in considering the purchase of a motor vehicle by the State Tuberculosis Board.

POWERS AND DUTIES OF STATE OFFICERS AND AGENCIES

August 28, 1941.—041-513.

TUBERCULOSIS SANATORIUM—PURCHASE OF TRUCK

QUESTION: Chapter 19016, Acts of 1939 provides for a continuing annual appropriation for the operation of the State Tuberculosis Sanatorium. From such appropriation may the Sanatorium purchase a truck?

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To Hon. F. C. Elliot, Secretary, Budget Commission:

Such truck may be purchased,—provided the managers of the institution, either its Board or executive officer, certifies that this motor vehicle equipment is necessary for the use of the institution in carrying out its institutional purposes.

While Section 4 of Chapter 20896, Acts of 1941, prohibits the purchase of motor vehicles by any State officer, etc., payable from State funds, with the exception of purchases authorized by Sections 1, 2 and 2A and excepted by Section 3 thereof, the Legislature did not by this prohibition intend to prohibit purchases of motor vehicles which are necessary for the institution or agency in carrying out its institutional or agency purposes as prescribed by law, where a general appropriation of sufficient funds has been made from which payment can be made for the purchase of motor vehicle equipment required or necessary for properly conducting and carrying out such institutional or State agency purposes as previously authorized, and directed by statute.

To place a contrary construction on Section 4 might in many instances defeat the objectives and purposes of previously enacted statutes where a total of funds had been appropriated necessary to carry out such statutory purposes and intents.

For the information of the institution officers, and as a matter of declaration of legal interpretation involved, the opinion here expressed does not mean that this office will at any time approve the purchase of automobiles or motor vehicle equipment for the personal use of officers and employees of State agencies, departments, or institutions, on the ground that such purchases can be classified as necessary and regular expenses, because I believe that the legislative intent as expressed in Chapter 20896, Laws of 1941, is to prohibit any such purchases or any such classification.

It is my opinion that the Institution's regular appropriation provided for in Chapter 19016, Acts of 1939, which is a continuing annual one, will authorize this purchase under the above certification, but of course the cost of the equipment is to be charged against its regular and necessary expenditure.

This expenditure is not a matter over which the Budget Commission has any control.

NOTARIES PUBLIC

December 10, 1942.—042-555.

APPOINTMENT—QUALIFICATIONS

QUESTION: Is it necessary for a person to be a resident of Florida for one year before he may be appointed a notary public?

To Hon. Spessard L. Holland, Governor:

I have examined the statutes on the subject and find that there are no prescribed qualifications for such officials, Section 117.01 Florida Statutes, 1941, providing in part that "The Governor may appoint as many notaries public as to him shall seem necessary."

As a prerequisite to his right to execute the duties of his office, a notary public is required to give bond and take an oath for the honest, diligent and faithful discharge of his official duties, such bond to be approved and filed in like manner and place as the bonds of county

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officers. The following section makes women over twenty-one years of age eligible to such appointment upon the same terms and conditions and with the same powers and emoluments.

My conclusion is, therefore, that a one year, or any specific period of residence in the State of Florida, is not a prerequisite to one's eligibility for appointment to the office of notary public.

PUBLIC RECORDS

July 16, 1941.—041-383.

BOARD OF HEALTH—PHYSICIANS REPORTS

QUESTION: Is a record of a communicable disease, not venereal, submitted to a County Health Department a Public Record, and therefore subject to inspection at any time?

To Dr. William H. Pickett, Florida State Board of Health, Jacksonville, Florida:

Section 424 of the Revised General Statutes of 1920 (Section 490 of the Compiled General Laws of 1927) provides:

"Public records open to examination by citizens.—All State, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen."

Reports filed by physicians with the health officers, as required by a number of statutes, concerning the existence of certain diseases, are not, in my opinion, public records within the meaning of the above quoted statute. And, in addition, it seems to me that public policy would not be served by making such reports open to public inspection.

CHAPTER IX

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS

COMMISSIONERS—DISTRICTS

February 10, 1941.—041-53.

RESIDENCE—TEMPORARY EMPLOYMENT OUTSIDE DISTRICT

QUESTION: May a County Commissioner of one particular district in Okeechobee County maintaining his residence and homestead in the district for which he was elected, conscientiously and ably performing his duties as such Commissioner, be removed from office because of his accepting temporary employment in an adjoining county and because his family, during the school months, reside temporarily in the town of Okeechobee?

To Hon. T. W. Conely, Jr., County Judge, Okeechobee, Florida:

I call your attention to Sec. 461, Sub-section 4, C. G. L., relating to when an office is vacant. I construe the term "inhabitant" for the purpose of the statute to be synonymous with the terms "citizen" and "resident."

I also call your attention to Sec. 2152(1) C. G. L. Perm. Supp. You will note that this statute only applies to counties with not less than 10,000 nor more than 11,000.

In my opinion, the County Commissioner is not subject to removal because of the temporary employment nor because his family temporarily reside in the town of Okeechobee during the school term.

COMMISSIONERS—POWERS, DUTIES AND COMPENSATION

April 10, 1941.—041-190.

AUTOMOBILES—EXPENSE ALLOWANCE

QUESTION: May the County Commissioners of Manatee County allow each member of the board \$35.00 per month for automobile expenses while on county business within Manatee County?

To Hon. W. M. Wainwright, State Auditor:

I find no statute that would empower the Board of County Commissioners of Manatee County, or any other county, to provide such an allowance to the members of the board. In my opinion, the allowance mentioned is in its true nature compensation and not mere reimbursement for car expenses actually incurred, and a board cannot increase the compensation of its members beyond the limits authorized by the statutes.

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS—
Commissioners—Powers, Duties and Compensation**

COMMISSIONERS—POWERS, DUTIES AND COMPENSATION

August 2, 1941.—041-420.

**BOARD OF FORESTRY—COOPERATIVE AGREEMENT
WITH COUNTY**

QUESTION: (1) How may the Florida Board of Forestry and Parks enforce payment by the County Commissioners of Suwannee County of their assessment in the event they elect to continue their cooperative agreement?

(2) By what authority would the Florida Board of Forestry and Parks be authorized to cancel this agreement if in its opinion the County Commissioners are unable to finance their part of the cost as specified in the agreement?

To Hon. H. J. Malsberger, State Forester, Tallahassee, Florida:

(1) A cooperative fire control unit for Suwannee County having been approved by referendum, and taxes having been levied and collected to defray the expenses thereof, and an agreement having been entered into with Florida Board of Forestry, all pursuant to Chapter 17024, Laws of Florida, Acts of 1935, and Section 3 of said agreement providing that the County Commissioners of Suwannee County are obligated:

"To deposit, annually, the amount of money collected, as indicated above in Section 2, with the Forest Service and with the understanding that it shall be deposited by the Forest Service in the county cooperative budget to be expended by the service as hereinafter provided."

It is my opinion that Florida Board of Forestry can enforce payment by said Board of County Commissioners of Suwannee County into the county cooperative budget fund of all taxes collected for such purpose by a mandamus action against said Board of County Commissioners.

(2) Sections 11 and 6 of said Act provide in part as follows:

"Section 11. No Board of County Commissioners which is not now engaged in fire control work shall hereafter be authorized under the provisions of this Act to establish and/or maintain any fire control unit, unless and until the terms hereof shall be ratified by an affirmative vote of a majority of the qualified electors of such county voting in the election at which the question is submitted."

"Section 6. Whenever any Board of County Commissioners shall elect and decide to proceed under the power and authority granted by This Act, and shall, in pursuance thereof, enter into any agreement with the State Board of Forestry, it shall not thereafter have authority to discontinue operations hereunder or to cease to levy the tax herein provided for or to rescind its agreement with the State Board of Forestry unless and until authorized so to do by a majority vote of the qualified electors of such county."

While Section 1 of said cooperative agreement provides that the same shall remain in effect "until the service, due to lack of finances or for other reasons, advises the county by registered mail * * * to cancel the agreement * * *", no authority is given by said Act to the Board of Forestry to rescind or cancel said agreement.

It is, therefore, my opinion that said provision of Section 1 of said contract re cancellation by Florida Board of Forestry is without

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS—
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authority, inoperative and of no effect; and I recommend that any future cooperative agreements to be executed be revised and such provision eliminated therefrom.

It is my further opinion that a majority of the qualified electors, pursuant to Section 11 of said Act, having by an affirmative vote approved the establishment and maintenance of a County Fire Control Unit, that such is in effect a mandate that the Fire Control program be carried into effect; and the Board of County Commissioners, under Section 6 of said Act, being without authority "to rescind its agreement with the Board of Forestry unless and until authorized so to do by a majority vote of the qualified electors of such county," that your board is authorized by mandamus proceedings against the Board of County Commissioners of Suwannee County to compel all Acts and things to be done necessary to carry into effect said County Fire Control Unit program as authorized and approved by the electorate of said county.

COMMISSIONERS—POWERS, DUTIES AND COMPENSATION

March 20, 1941.—041-164.

BOND FUNDS—TRANSFER

QUESTION: May the County Commissioners of Escambia County transfer the proceeds of a Bond Fund to some other fund of the county after all bonds and coupons have been paid in full?

To Hon. J. M. Lee, Comptroller:

I have examined our opinion of September 27, 1940, and find that the then Attorney General held in regard thereto:

"The duties of the County Commissioners are strictly statutory and I find no authority for the transfer of the funds above mentioned, and it is my opinion that this cannot be done in the absence of legislative permission."

I also find in an opinion under date of November 2, 1937, that the then Attorney General held:

"I do not think that the sinking fund balances which were collected from the taxpayers for the payment of the bonds in question should be transferred and used for any other purpose."

I am of the opinion that the foregoing opinions that I have quoted from correctly state the proper procedure to follow, and particularly the one of September 27, 1940, with reference to securing legislative permission.

COMMISSIONERS—POWERS, DUTIES AND COMPENSATION

August 5, 1942.—042-379.

BOND FUNDS—TRANSFER

QUESTION: Has the Board of County Commissioners authority to transfer certain bond funds remaining, after an issue has been entirely paid off, to some maintenance fund of the county?

To Hon. J. M. Lee, Comptroller:

In reply wish to advise that I am of the opinion that if all the bonds and coupons that were issued were fully paid and canceled, then

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS—
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it would be proper for the Board of County Commissioners to transfer certain Bond Funds remaining to the Maintenance Fund of that particular district or, if it was a county bond issue, to any Maintenance Fund of the county, provided, however, that the full amount that could be levied under the law for maintenance purposes had not been levied and that the county transfer to the Maintenance Fund would not equal more than the amount levied for maintenance than that authorized by law to be levied. In other words, if the County Commissioners did not levy the full amount allowed by law for maintenance, it could, under the circumstances mentioned above, make up such difference between the amount levied and the amount allowed by law to be levied by transferring the funds remaining in the Bond Fund. Otherwise I do not think it would be proper so to do. In this connection see the case of *Chamberlain vs. City of Tampa*, et al, 23 So. 572.

COMMISSIONERS—POWERS, DUTIES AND COMPENSATION

August 21, 1942.—042-415.

BOND FUNDS—TRANSFER

QUESTION: Where all county, district and school district bond issues have been paid off, may the Board of County Commissioners transfer any remaining bond funds in county and district bond funds to other maintenance funds of the county?

If above answered in the affirmative:

(1) Where there are two or more county bond issues and one issue has been paid in full, may the surplus money remaining in the paid off bond issue funds be transferred to other maintenance funds of the county?

(2) Where the paid off bonds are county district bonds and there are outstanding county bonds, may the surplus money in the paid off county district bond fund be transferred to other maintenance funds of the county?

(3) Where all the county bonds and all the district bonds have been paid in full but there are outstanding school district bonds may the surplus funds remaining in the county and district bond fund be transferred to other maintenance funds of the county?

To Hon. J. M. Lee, Comptroller:

I wish to advise that under date of August 5, 1942, I gave you an opinion answering the first question propounded in the affirmative but under certain limitations, i.e., the money could only be transferred to the maintenance fund of the particular unit from which the tax originated and then only if the maximum amount allowed by law had not been levied for maintenance purposes, and further, that such sum transferred should not exceed the amount that could have been levied but was not.

In answer to your question numbered 1, I am of the opinion that same should be answered in the negative.

In answer to questions numbered 2 and 3, I believe that it would be wise to obtain an act of the Legislature as I am unable to find any authority to authorize transfers contemplated by the said questions.

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS—
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January 20, 1941.—041-15.

COUNTY ATTORNEY—COMPENSATION

QUESTION: Can the County Commissioners of Jackson County, Florida, pay the county attorney in addition to the annual compensation fixed in Section 6 of Chapter 18609, special Acts of 1937, fees for extraordinary services such as condemnation suits, etc., or is the \$600 per year the total amount they are authorized to pay for all services rendered the board?

To Hon. W. M. Wainwright, State Auditor:

Section 3 of Chapter 18609, Special Acts of 1937, prescribes the duty to be performed by the county attorney for Jackson County, and Section 5 of the Act fixes the compensation to be paid him for his services as prosecuting attorney of the county judge's court in said county.

Section 4 of the Act prescribes his duties as county attorney other than as the prosecuting attorney of the county judge's court, and Section 6 fixes the compensation to be paid him for the duties performed as defined in Section 4.

Section 4 makes it his duty to advise the Board of County Commissioners of the county upon all legal matters coming before them, whether the interest of the county is involved or the official duties of the Board of County Commissioners is involved " * * * and generally to attend to all legal matters for the county which come under the jurisdiction of the Board of County Commissioners."

Section 2282 of the Compiled General Laws of Florida, 1927, provides:

"The Board of County Commissioners may, by resolution, authorize the acquirement by eminent domain of property, real or personal, for any county use or purpose designated in such resolution."

The acquiring of property for a county purpose does, therefore, come under the jurisdiction of the Board of County Commissioners, and the legal services rendered by the County Attorney of Jackson County under Chapter 18609 come within the scope of the duties required of said County Attorney as defined in Section 4 of the Act, and are covered by the annual compensation of \$600 fixed in Section 6 of Chapter 18609. It follows, therefore, that the County Commissioners are without legal authority under Chapter 18609 to pay to the County Attorney of Jackson County additional fees for services rendered in condemnation suits.

COMMISSIONERS—POWERS, DUTIES AND COMPENSATION

February 20, 1941.—041-81.

COUNTY PHYSICIAN—EMPLOYMENT

QUESTION: In the absence of any sum having been budgeted for the purpose, and in the absence of a special law, would the County Commissioners of Hendry County, Florida, be authorized to employ a county physician?

To Board of County Commissioners of Hendry County, Florida:

I shall assume the designation "county physician" means one to treat and give medical attention to the poor and indigent citizens of

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS—
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the county who are sick, injured and maimed and would be similar to the county physician as provided for in Section 2276(9) of the Compiled General Laws, 1927, Permanent Supplement, Vol. 2. This relates to counties having a population of not less than 9,700 nor more than 10,500 according to the last census, and of course, your county is not within said population bracket.

However, under Section 2153 of the Compiled General Laws of Florida, one of the duties imposed upon the Board of County Commissioners is "to have care and provide for the poor and indigent people of the county," and it is possible that under this provision the Board of County Commissioners would have the authority to provide a county physician to care for and provide for the poor and indigent people of the county. This brings me to the question of whether or not in the absence of any sum having been budgeted for the purpose, what you could do.

Under Section 2306, Compiled General Laws, 1927, Permanent Supplement, Vol. 2, before an expenditure could be made, it would have to be placed in the budget because this law provides:

" . . . the Board of County Commissioners shall make an estimate of the necessary and ordinary expenses, and of all special and extraordinary expenditures contemplated, for the fiscal year, ensuing, and for which the revenue for the levy, shortly to be made will be available. Such estimates shall set out every item of expenditure contemplated or reasonably to be anticipated during the year for which such estimates are made, with as much particularity as is practicable, and in conformity to the headings of expense accounts prescribed by the State Comptroller, and shall designate the particular fund from which each item of expenditure shall be paid; such designation being according to the laws now existing, or hereafter becoming law . . . The adoption of said estimates by the said board shall give said estimates the force and effect of fixed appropriations, *and the same shall not be altered or amended or exceeded, nor shall the expenses estimated under one head be paid out of the estimate for any other expense . . .*" (Emphasis supplied.)

If there is in your county budget an item for the care and provision of the poor and indigent people of your county and you still have an unexpended balance in this item, it would probably be proper for you to pay a county physician out of this particular item. However, if you anticipate spending all the money in this item for other purposes and that same will run short, this situation seems to have been taken care of by the following language in the Section above quoted from:

" . . . provided, however, that any item of expenditure set forth in an estimate of expenditures may be transferred to another item of expenditure . . . "

The manner in which this is to be done is provided for as follows by the same Section:

" . . . upon resolution duly adopted by the Board of County Commissioners when approved by the Comptroller of the State of Florida, except items of expenditure for debt service; and provided, further, that in counties where there exists a budget commission, the approval of such budget commission shall first be obtained before the Comptroller is authorized to approve such transfer . . . "

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS—
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November 28, 1941.—041-665.

ELECTIONS—EXPENSE

QUESTION: The Board of County Commissioners made no provision in their budget for the expense of the election required to be held under Chapter 21238, Acts of 1941. Are they authorized to pay the expense of this election from the contingency item of their General Revenue Fund of the County?

To Hon. J. M. Lee, Comptroller:

Section 8 provides:

"Whenever a petition signed by at least five (5) per cent of the qualified and registered voters in said municipality or county requesting the governing body of said municipality or county to provide, establish, maintain and conduct a supervised recreation system and to levy an annual tax for the conduct and maintenance thereof of not less than one-half of one mill nor more than one mill on each dollar of assessed valuation of all taxable property within the corporate limits or boundaries of said municipality or county, *it shall be the duty of the governing body of said municipality or county* to cause the question of the establishment, maintenance and conduct of such supervised recreation system to be submitted to the qualified voters who are freeholders to be voted upon at the next general or special election of said municipality or county; provided, however, that such question shall not be voted upon at the next general or special election unless such petition shall have been filed at least thirty days prior to the date of such election." (Emphasis supplied.)

It is obvious from a reading of the foregoing provisions of said Act that the Legislature placed a mandatory duty upon the governing body to call an election whenever the provisions of said paragraph have been complied with. That is, the requirement for the filing of the petition must have been complied with, however, before the mandatory character of the law exists.

Therefore, whenever it is necessary for the Board of County Commissioners to hold an election under and by virtue of Section 8 of said Act, above quoted, they would be authorized to pay the expense of this election from the contingency item of the General Revenue Fund of the county.

COMMISSIONERS—POWERS, DUTIES AND COMPENSATION

April 23, 1942.—042-198.

EXPENSES—REIMBURSEMENT

QUESTION: (1) Does the expense allowance in Section 2 of Chapter 20709, Acts 1941, cover complete reimbursement for all traveling expenses, or are there allowable in addition thereto:

(a) Expenses outside of the county;

(b) Mileage under Section 2204, Compiled General Laws, 1927?

(2) Should the requisitions provided in Section 2 be itemized, or merely be made for lump sums without itemization?

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS—
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To Hon. Bryan Willis, State Auditor:

Section 2 of Chapter 20709, Laws of Florida, Acts of 1941, provides that in addition to the salary provided for in the Act each member of the Board of County Commissioners shall be allowed an expense account of \$35.00 per month, payable on his own requisition upon approval by the board. Section 2204, Compiled General Laws, 1927, provides that County Commissioners shall be paid 10c per mile for each mile actually traveled in going to and from the courthouse, no mention is made of other mileage.

The allowance of an expense account to a member of a board is intended as a reimbursement for actual expenditures made by the individual member on behalf of the county or other unit represented by the board. Former attorney generals have held that County Commissioners have the right to provide for the attendance of one or more of their members at State associations and other meetings for the purpose of discussing and acting upon matters of general county interest and welfare, provided that the payment of such expense is properly arranged for in the county budget. The Supreme Court made a similar ruling in the case of *Adams vs. Lott*, 112 Fla. 489, 150 So. 596.

There seem to be certain expenses in connection with the duties of the Board of County Commissioners which are the expenses of the board as a unit and not the expenses of the individual members of the board, such as the employment of an auditor to assist the board, sending representatives to meetings of the State Road Department, payment of dues in County Commissioners associations, etc. The Legislature, when it provided \$35.00 per month for expenses of the individual members of the County Commissioners, evidently intended that sum as reimbursement to members for expenses incurred as members of the board and not as representatives of the board when sent to other counties and other general board expenses. That being true, I do not think that the expenses of one or more members designated as representatives of the board to attend a meeting and represent the board as a unit should be charged against the \$35.00 limitation in the law. However, such expense, as representative of the board, must be provided for in the budget as other items are required to be provided for.

The mileage to and from the courthouse, provided for in Section 2204, Compiled General Laws, 1927, seems to be part of the traveling expenses of individual members of the board.

A former attorney general, in an opinion dated April 13, 1938, held that expense accounts of County Commissioners should contain sufficient facts to show that the expenses were incurred strictly for county purposes; and that they should contain detailed information similar to that required to be stated in expense accounts of State officers and employees. I see no reason to depart from this rule.

Therefore, in answering the above stated questions:

(1) The expense allowance, mentioned in Section 2, Chapter 20709, Laws of Florida, Acts of 1941, covers reimbursements for traveling and other expenses of individual board members, but not expenses of the board while acting as a unit. If the board, acting as a unit, directs that one of its members represent it at a meeting, in which the county is interested, outside of the county, such expenses would not be a part of the expense mentioned in Section 2 aforesaid. Mileage under Section 2204, Compiled General Laws, 1927, would be a part of the expenses mentioned in said Section 2.

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(2) The expense accounts should be itemized and not stated as lump sums. The county budget should provide for expenses of the board, otherwise there will be no authority to pay the same.

COMMISSIONERS—POWERS, DUTIES AND COMPENSATION

February 28, 1942.—042-98.

JUDGMENTS—COMPROMISE AND SETTLEMENT

QUESTION: Do County Commissioners have authority to compromise and settle judgments upon estreated bonds and to satisfy the same of record?

To Hon. J. M. Lee, Comptroller:

I have very carefully considered the matter because of the fact that there had been two opinions by previous Attorney Generals upon this same subject, such opinions being in conflict.

Under date of November 18, 1933, the then Attorney General held that the County Commissioners were authorized to accept offers of compromise of judgments on estreated bail bonds. On April 18, 1940, the then Attorney General, held just to the contrary.

In the opinion rendered by the Attorney General under date of November 18, 1933, appearing in the 1933-1934 Biennial Report, page 212, he said:

"The general powers of a Board of County Commissioners include among others the power to make such orders concerning the care of and improvement of the corporate property of the county as may be deemed expedient, and also the power to represent the county in the prosecution and defense of all legal causes. (Compiled General Laws, 1927, Section 2153).

"These judgments are entered in favor of the State of Florida for the use and benefit of the particular county (See Sections 2827 and 8356, Compiled General Laws, 1927). The county is therefore the real party in interest, and the State is a mere nominal or formal party.

"The law is well settled by a decided weight of authority that the County Commissioners have the power to compromise or settle claims which the county may have prior to judgment thereon. As to the power of the Board of County Commissioners to compromise or settle for less than the full amount, judgments obtained by the county is a matter upon which there is a direct conflict of authority. This question has never been determined by our Supreme Court, but I am of the opinion that better reason supports the rule to the effect that such power exists, provided that the compromise is made in good faith and the judgment is not collectible in full, the usual ground of non-collectibility, of court, being insolvency. (Insolvency is used in the sense of inability to meet claims because of lack of sufficient assets out of which the same can be realized).

"In other words, I am of the opinion that the same rules of business conduct by which a prudent person is governed are applicable to a county in the management of its affairs under similar circumstances; that the power to compromise in a situation of this kind is derived from the express powers vested in the board, and that to deny the county any recovery because it cannot recover all would in many in-

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stances defeat the realization by the county of moneys to which it is entitled.

"I am not unmindful of the fact that such ruling may open the door to compromises or settlements that are not justified by the facts; but we must presume that county officials will discharge their duties in good faith for the best interest of the county involved. The vesting of any power carries with it the possibility of its abuse.

"I am of the opinion, therefore, that a Board of County Commissioners in a proper case by proper resolution may accept an offer of compromise of a judgment, and direct the clerk of their board or the prosecuting attorney of the county appearing as counsel of record in the proceedings resulting in the judgment, to satisfy the same of record; and that such satisfaction will be legal and binding."

I am of the opinion ~~that~~ the above reasoning is logical and the proper conclusion has been reached. I therefore hold that the County Commissioners have authority to compromise and settle judgments upon estreated bonds and to satisfy the same of record, and overrule the opinion of April 18, 1940, appearing in the Biennial Report of the Attorney General for 1939-1940.

COMMISSIONERS—POWERS, DUTIES AND COMPENSATION

March 22, 1941.—041-150.

PRISONERS—FUNERAL EXPENSES

QUESTION: A prisoner who had been incarcerated in the county jail under a charge of rape, when not actually in the custody of the sheriff, was killed by his half-brother while attempting to get his step-mother to sign a bail bond. Would the county be liable for the hospital and funeral expenses of such prisoner?

To Hon. W. M. Wainwright, State Auditor:

Sections 2833, 2834 and 2835, Compiled General Laws of 1927, provide for the procedure regarding costs incurred in a criminal case which is abated by the death of the defendant. These sections provide:

"2833. If defendant is not convicted, or dies. If the defendant is not convicted, or the prosecution is abated by the death of the defendant, or if the costs are imposed on the defendant and execution against him is returned no property found, or if a nolle prosequere be entered, in each of these cases the fees of witnesses and officers arising from criminal causes shall be paid by the county in the manner specified in the next three sections: Provided, that when a committing magistrate holds to bail or commits a person to answer to a criminal charge and an information is not filed or an indictment found against such person, the costs and fees of such committing trial shall not be paid by the county, except the costs of executing the warrants.

"2834. Officer to make out accounts as directed. The officer shall make out his account against the county in such form as the County Commissioners may require, stating the services for which the fee is charged, the title of the case in which the services were performed, and the facts which, under the provisions of the preceding section, make the fees a good claim against the county, including all legal charges and costs before justices of the peace, and present the same to the Board of County Commissioners, with the affidavit that the same is correct.

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"2835. Powers and duties of County Commissioners. The County Commissioners shall have the right to reject all or any portion of any account which is not a valid claim against the county, and shall allow and pay the same only when it is just, correct and reasonable, and no constructive mileage or illegal or unnecessary item or charge in any frivolous case shall be allowed."

Section 4588, Compiled General Laws of 1927, which is applicable to the Sheriff of Calhoun County, provides as to fees to be charged by sheriffs, "safe-keeping and punishment of prisoners (not otherwise provided for) actual and necessary expense, bill to be approved by the judge under whose jurisdiction the case shall come."

In my opinion, in an emergency, the hospital expenses of a prisoner may be an actual and necessary expense under this section, the bill for the same, however, as the statute specifies, to be approved by the judge under whose jurisdiction the case shall come.

A more difficult question arises with regard to the burial expenses. Whether or not the burial expense is a necessary expense under that section need not be decided, because I believe that the Board of County Commissioners have the power to pay these expenses under Section 2153, Compiled General Laws of 1927, which provides that the Board of County Commissioners of each county shall have power to "have care and provide for the poor and indigent people of the county." Apparently the prisoner in question was an indigent person, for Mr. Knight's letter states that it is doubtful whether the prisoner has a sufficient estate to pay the bill in question.

COMMISSIONERS—POWERS, DUTIES AND COMPENSATION

February 6, 1941.—041-39.

SHERIFFS—PRESENCE AT BOARD MEETINGS—COMPENSATION

QUESTION: (1) Does the law require the presence of a sheriff at a regular or special meeting of the Board of County Commissioners?

(2) To what compensation is the sheriff entitled?

To Hon. H. D. Howell, Clerk Circuit Court, Bonifay, Florida:

(1) Your question seems to be answered by Section 2859 of the Compiled General Laws of 1927, which provides:

"The sheriff shall attend the meetings and execute the orders of the Board of County Commissioners of his county, and for services to said board he shall receive such compensation out of the county treasury as they shall deem proper."

In 1933, three Acts of the Legislature were passed relating to this subject. However, all three Acts were upon a population basis. The Acts now appear as Section 2859(1), Compiled General Laws, 1927, Permanent Supplement, Vol. 2. I quote:

"In all counties of the State of Florida having a population of not less than thirteen thousand and not more than sixteen thousand, or not less than fifteen thousand six hundred and not more than fifteen thousand seven hundred fifty, or not less than thirteen thousand and not more than thirteen thousand five hundred, according to the Federal census of 1930, the Board of County Commissioners shall have the power and authority to fix and allow the compensation for the sheriff

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of the county for attending meetings of the Board of County Commissioners."

I have examined the original Acts that were passed by the Legislature and I do not find where they amend the first above quoted Section 2859, Compiled General Laws, 1927. Said Acts do provide that all laws in conflict are repealed but I see no conflicts between the Acts, and, under the holdings of the Supreme Court, unless there is a conflict, the prior Act is still in effect.

(2) I do not find where the general law that fixes the services and compensation of the sheriff has any provision with reference to the above.

COUNTY BUDGETS

July 7, 1942.—042-338.

EXPENSES—BUDGET COMMISSION

QUESTION: May the members of the Budget Commission of Polk County, Florida, make a fixed charge of \$10.00 as their expenses for attending each meeting of the said commission without regard to the sum actually expended?

To Hon. Spessard L. Holland, Governor:

The Budget Commission in Polk County exists under Chapter 15934, Laws of Florida, Acts of 1933, as amended by Chapter 16886, Laws of Florida, Acts of 1935. Section 3 of Chapter 15934, which was not amended by the 1935 Act, provides that members of the said Budget Commission "shall serve without pay" but shall be entitled to be "reimbursed" for their "actual expense."

The word "reimburse" as used in the above statute means to "pay back" or "to make return or restoration of an equivalent of something paid out or expended"; and the phrase "actual expenses" contemplates something paid out or expended, that is, something actually paid out or expended and not some theoretical charge. The statute contemplates that the members shall donate their time without compensation but may be repaid the actual sums paid out by them in attending to the business of the commission. The said expenses are payable by the County Commissioners out of the general fund on requisition of the chairman of the Budget Commission.

In order to be considered, all expenses for reimbursement should show that they were incurred strictly for county purposes. They should contain detailed information similar to that required to be stated in expense accounts of State officers and employees. Any doubt arising from the failure of the expense account to disclose the nature of the traveling expense item as being strictly a reimbursement for money expended should be resolved against the legality of the expenditure. No requisition should be approved by the chairman of the Budget Commission or paid by the County Commissioners which fails to detail the expenditures in accordance with the above rule.

COUNTY BUDGETS

March 19, 1941.—041-152.

FINE AND FORFEITURE FUND—EXCESS EXPENDITURES

QUESTION: Because of the activities at Camp Blanding, the sheriffs of Bradford and Clay Counties have found it necessary to

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employ additional deputies. The revenue now being received from fines and forfeitures which is now deposited in the Fine and Forfeiture Fund is of a larger amount than anticipated by the Clerk of the Court when the budget was prepared for the fiscal year beginning October 1, 1940, and ending September 30, 1941, and the heavy expenditures caused by the employment of said deputies has now exceeded the amount set up in the budget for the fiscal year. May the Board of County Commissioners legally exceed the budget set for the Fine and Forfeiture Fund for this fiscal year if same was set for \$10,000.00 and receipts were received to the credit of this fund in the amount of \$15,000.00?

To Hon. J. M. Lee, Comptroller:

You call my attention to the following language of Chapter 16286, Acts of 1933:

"That after the Board of County Commissioners set up a budget the amount can not be legally altered, amended or exceeded."

And for information you refer to Page 201 of the 1933-1934 Biennial Report of the Attorney General, and Page 59 of the 1937-1938 Biennial Report of the Attorney General.

I have examined the first opinion that you have referred to and I do not believe that it is in point because the particular fund involved would not exceed the anticipated revenues. I think the other opinion is in point. The question there involved is whether or not a county can employ a county traffic officer and pay him from the Fine and Forfeiture Fund of the county in view of the fact that State Patrol Officers had been removed from the roads. The then Attorney General held:

"It is my opinion that the County Commissioners of a county may employ such a County Traffic Officer if there are sufficient funds available in the Fine and Forfeiture Fund *over and above the contemplated requirements for the remainder of the year* or if there is a sufficient amount for such purpose available in any other fund and a transfer of the same should be approved by the State Comptroller and by the County Budget Commission, if any. Otherwise, I do not think such employment would be authorized."

Under the facts as submitted by you, I am of the opinion that the rule announced in said opinion of March 11, 1937, page 59 of the Biennial Report of the Attorney General for 1937-1938, is the proper one to follow. I, therefore, hold that the Board of County Commissioners may exceed the budget set up for the Fine and Forfeiture Fund by reason of the necessity for the employment of additional deputy sheriffs, regardless of the fact that same was set up for \$10,000.00, provided that the expenditures are not in excess of the amount received from fines and forfeitures and deposited in the Fine and Forfeiture Fund.

COUNTY BUDGETS

April 9, 1941.—041-191.

FINE AND FORFEITURE FUND—FEES—FEEDING PRISONERS

QUESTION: Must County Commissioners of Hillsborough County pay bill for feeding prisoners when rendered and audited by them, or may payment be held in abeyance for months at a time?

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To Hon. Hugh Culbreath, Sheriff, Hillsborough County:

Section 2838, Compiled General Laws, 1927, provides:

"Fees for feeding prisoners: The sheriff shall make out and present to the Board of County Commissioners, at any regular meeting thereof, his bill for fees for feeding prisoners and the period for which the charge is made, which fees shall be as follows: For feeding twenty prisoners, or less, sixty-five cents per day each; and for feeding all over twenty prisoners, fifty cents per day each; and it shall be the duty of said board to properly audit the same, and order a warrant drawn against the Fine and Forfeiture Fund of the county for the sum found to be due."

Neither this section nor any other statute requires that the Board of County Commissioners perform their duty to make this payment within a particular time. However, I call your attention to the following rules recognized by the Florida Supreme Court.

In *Palm Court Corporation vs. Smith*, 103 Fla. 233, 137 So. 234, the court held:

"that diligence in the discharge of their duties is required of public servants . . ."

and held the same in previous cases.

In *Board of Commissioners vs. Board of Pilot Commissioners*, 52 Fla. 197, 42 So. 697, the Supreme Court more specifically held:

"When an expenditure by a county is authorized by a valid law, and the correctness of the amount due by the county is ascertained and approved as the law directs, there being no question as to bona fides, it is the duty of the County Commissioners to audit, approve, and pay the same, and such payment may be enforced by mandamus."

Answering your inquiry then, you are advised that the statutes of this State have not set a definite time within which the Board of County Commissioners shall pay the sheriff's bill for feeding prisoners after the bill has been audited by the board, but the board is required to exercise diligence in the performance of its duties, and may be required to pay the same if they fail to do so after a reasonable period has elapsed.

COUNTY BUDGETS

August 25, 1941.—041-472.

GASOLINE TAX FUNDS—ALLOCATION

QUESTION: Under what circumstances may gasoline tax funds allocated to the county under Chapter 20303, Acts of 1941, be used immediately although not contemplated in the previously adopted budget?

To Board of County Commissioners of Escambia County, Florida:

I quote from a previous opinion on this subject:

"I am, therefore, of the opinion that it was the intention of the Legislature to make the allocation provided for in said paragraph to the counties for immediate use provided, however, that proper budgetary proceedings are followed. I think that you should also take into consideration the three Special Acts that were passed by the Legislature,

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being Chapters 21217, 21211 and 21212, Laws of Florida, Special Acts of 1941 . . ."

In order that there will be no further misunderstanding, it might be well for me to state what "proper budgetary proceedings" means. What I meant by that was for you to set up in a supplemental budget what you anticipate in the way of revenue under Chapter 20303, Acts of 1941, and that this proposed supplemental budget be advertised in the same manner as the regular annual budget, and that a meeting be held at the appointed time for the purpose of considering and adopting the budget. In other words, proceed exactly the same as if you were adopting your yearly budget. I am of the opinion that after the adoption of same, you can then use the money in accordance with the adopted supplemental budget.

COUNTY BONDS

August 20, 1941.—041-462.

TRUSTEES—COMPENSATION

QUESTION: Should the amounts received from the sale of refunding bonds issued to retire an original issue be considered as receipts and disbursements in computing the compensation of such Trustees under Section 2327, Compiled General Laws?

To Hon. W. M. Wainwright, State Auditor:

Inasmuch as refunding bond issues are limited in an amount necessary to retire original issues, I am of the opinion that the amounts received for refunding bonds may not be considered in computing the compensation of trustees of county bonds under the statute mentioned.

GENERAL REFUNDING LAW

August 8, 1941.—041-441.

REFUNDING CONTRACT—APPROVAL

QUESTION: Is the Board of Administration authorized and required to approve refunding contract between Bay County and Sullivan, Nelson & Goss, Inc.?

To Hon. J. Edwin Larson, State Treasurer:

Chapter 15772, Laws of Florida, Acts of 1931, seems to cover the whole field of refunding operations by counties, of bonded debt, and in very plain language, found in Section 27 thereof, vests power exclusively in the several counties and districts. You are further advised, however, that under the provisions of the Acts of the Legislature of 1941, granting certain powers to the Board of Administration, with reference to funds credited to counties from gasoline taxes, there might well come a time when the Board of Administration would be in position to exercise wide authority, particularly in the matter of the exchange of original for funding bonds.

COUNTY ROADS

July 2, 1941.—041-386.

**SECOND PROVISION FUNDS—ALLOCATION—UNDER CHAPTER
20303, ACTS OF 1941**

QUESTION: Where certain conditions have destroyed road construction, and a national emergency requires these roads to be put in

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service, and where additional funds have been voted by the legislature but not contemplated in the County Road and Bridge District budget, would the County Commissioners under Chapter 20303, Acts of 1941, be authorized to continue to maintain the county roads, despite the fact that the budget for this purpose as adopted a year before has been exhausted?

To Hon. J. M. Lee, Comptroller:

In reply I wish to advise that I have examined the paragraph of Chapter 20303 referred to by you. It reads:

"Twenty (20%) per cent of such county's allocation of Second Provision Funds shall monthly be transmitted to its Board of County Commissioners to be used to construct, improve and maintain roads and bridges within the County."

You will observe that there are no limitations placed upon the use of this money by the County Commissioners with reference to whether or not such money appropriated to the counties was contemplated in its budget. I am, therefore, of the opinion that it was the intention of the Legislature to make the allocation provided for in said paragraph to the counties for immediate use provided, however, that proper budgetary proceedings are followed. I think that you should also take into consideration the three Special Acts that were passed by the Legislature, being Chapters 21217, 21211 and 21212, Laws of Florida, Special Acts of 1941.

COMPENSATION OF COUNTY OFFICIALS

June 9, 1941.—041-318.

COUNTY OFFICERS—EFFECT OF CENSUS ON SALARY

QUESTION: Would officials who continued to draw remuneration for their services (from April 1, 1940, the effective date of the 1940 Federal Census, to January 9, 1941, the date on which the population figures, according to said Census, were officially released), under the Acts which were no longer applicable to them under the 1940 Federal Census, be entitled to additional pay or liable for repayment of any excess drawn according to the particular law which now governs them?

To Hon. W. M. Wainwright, State Auditor:

On May 20, 1941, this office rendered an opinion to the Honorable J. M. Lee, Comptroller, in which we said that "Population Acts employing census as datum for fixing salaries are not static to a dated census but are ambulatory. The governing census prevails for the purpose of fixing salary."

We also said in that opinion that the new salary rate (in that instance for the State Attorney of the 15th Judicial Circuit) should be from April 1, 1940, which was the effective date of the 1940 Federal Census.

With respect to those officials who are paid a stated salary, it is my opinion that they would be entitled to receive, as additional pay for their services, the difference between what they actually received and the amount of salary allowed to them under the particular law which now governs their compensation. This is based upon the familiar rule that an officer is not ordinarily estopped from claiming legal compensation by having accepted less than statutory salary.

With respect to those officials whose compensation is restricted to a percentage of the fees collected by him, and who has paid into the County

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excess fees of his office and retained for himself less than the amount the law allowed him at that time, it is my opinion that he cannot recover back any part of such fees for the purpose of increasing his compensation to the amount he was entitled, under the prevailing law, to receive. This is predicated upon the familiar principle that money voluntarily paid cannot be recovered back and has been sanctioned by our Supreme Court. However, if, after having paid into the County such excess fees, the official then collects earned fees for the past period, he may, before paying such fees into the County, deduct therefrom any excess compensation that he would be entitled to for the past period, under the prevailing Salary Law at that time.

With respect to those officials who received compensation in excess of the amount to which they were lawfully entitled, under the prevailing law, it is my opinion that such officials are liable for the repayment of such excess, on the grounds that the payment thereof was an unauthorized expenditure of public funds.

Inasmuch as none of the particular Acts in question have been presented for our consideration, this opinion is based upon the assumption that such Acts are valid and Constitutional.

COMPENSATION OF COUNTY OFFICIALS

May 7, 1942.—042-232.

EXCESS FEES—EXPENDITURE

QUESTION: What is the effect of Chapter 15934, Acts of 1933, which created a county budget commission in certain counties, upon Section 4, Chapter 11954, Acts of 1927, which provided for the county excess fee fund of the county?

To Hon. Bryan Willis, State Auditor:

Section 4 of Chapter 11954, after setting up the county excess fee fund, provides that the expenditures shall be made from that fund, "for the purpose of equipping, maintaining and supplying said office, from which said money is derived, with necessary books, furniture, fixtures and all other things now supplied or furnished by the board of county commissioners and paid for by them from the general revenue of the county." It is further provided that any funds not needed for this purpose may be transferred into the general funds of the county, including the general school fund.

Section 9 of said Chapter 15934, among other things, requires that the county budget commission, created by it, fix and determine the expenditures of *each and every county officer* for salaries and for supplies and other expenditures necessary for the operation of the office and when fixed and determined this budget is given the force and effect of a fixed appropriation which cannot be altered or amended.

Chapter 15934 contains no provision expressly repealing or amending any part of Chapter 11954, but does contain a general provision repealing all laws and parts of laws in conflict with it.

I am of the opinion that when Chapter 11954, Acts of 1927 and Chapter 15934, Acts of 1933, are read together that:

(a) The county budget commission under Chapter 15934 is required to fix and determine the expenditures to be made for books, furniture, fixtures and other things for each county office, which budget has the

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effect of limiting the expenditures for the office without regard to the amount of excess fees paid over by that office;

(b) Chapter 15934 requires a separate budget of expenditures for each county office, and a general budget of expenditures for all county offices does not meet this requirement. The expenditures for each office should be fixed separately.

(c) The excess fees paid over by each office should be applied as far as necessary for the purchase of supplies for that office; as required by Section 4 of Chapter 11954, Acts of 1927, however, the budget, as set up by the budget commission, limits the amount of such expenditures without regard to the amount of excess fees paid over.

(d) When the amount fixed by the budget has been spent no further expenditures may be made, for the purposes covered by the budget, because the budget has the force and effect of a fixed appropriation and cannot be altered or amended.

COMPENSATION OF COUNTY OFFICIALS

February 27, 1941.—041-90.

EXCESS FEES—SCHOOL BOARD

QUESTION: (1) Does the recent census entitle the Hillsborough County School Board to all or part of the excess fees turned over to the County Commissioners over and above the operating expenses of the various fee officers?

(2) If the mentioned condition exists, is the Hillsborough County School Board entitled to all or part of the excess fees from all fee officers or from the excess fees of the tax assessor or tax collector?

To Hon. Colin English, Superintendent, Department of Education:

(1) I find that Chapter 19576, Acts of 1939, appears to be applicable to Hillsborough County, relating to excess fees distribution. This Act provides for the apportionment of the excess fees paid over by Tax Assessor and Tax Collector, a part of which is to be paid to the Board of Public Instruction, such portion being determinable by the provisions as set out in Section 2 of the said Act.

This Act was made applicable to all counties having a population not less than 180,000, according to the last State or Federal Census. Hillsborough County, under the 1940 Census, which was the last Federal Census, has a population in excess of 180,000; therefore, the Act appears to have become applicable to Hillsborough County on the effective date of the 1940 Census, to-wit, April 1, 1940.

(2) Having pointed out above the law under which excess fees from tax assessor and tax collector are distributable, in part, to the Board of Public Instruction of Hillsborough County, and this being "the mentioned condition" referred to in the preceding paragraph, I go further and call your attention to the following:

Chapter 19,576, Acts of 1939, relates only to the excess fees paid over to the County Commissioners by the Tax Assessor and Tax Collector. We have not found any other Act relating to the excess fees of other officers in Hillsborough County, except Chapter 11954, Acts of 1927, which is the General Act on the subject. Section 4 of which Act (Section 2868 C.G.L.) provides as follows:

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"That it shall be the duty of each and every such officer to pay annually hereafter into a special fund all money in excess of the sum to which they are, under the provisions of this Act, entitled and as annual compensation herein allowed, the Board of County Commissioners shall create such fund and shall expend the proceeds thereof for the purpose of equipping, maintaining, and supplying said office, from which said money is derived, with the necessary books, furniture, fixtures and all other things now supplied or furnished by the Board of County Commissioners and paid for by them from the General Revenue of the County. Provided that should the funds so created exceed the amount necessary for the purposes provided in this section, then the Board of County Commissioners shall have the authority, with the approval of the State Comptroller, to transfer same to the general county funds including the general county school fund." (*Italics supplied.*)

A reading of this Section reveals that the funds paid over as excess fees are to be expended first toward the operation of the office of the officer paying over such fees and any amount not necessary for that purpose is to be transferred "to the general county funds, including the general county school fund." This language seems somewhat indefinite as to what funds are to receive the amount transferred; however, we are of the opinion that the County Commissioners with the approval of the State Comptroller may transfer to any fund selected by them, which may include the general school fund. Although, I do not believe they would by law be required to pay any sums whatsoever to the school fund as the same seems to be entirely up to their discretion.

COMPENSATION OF COUNTY OFFICIALS

January 13, 1942.—042-20.

EXCESS FEES—TAX ASSESSORS AND COLLECTORS

QUESTION: (1) Does Chapter 20891, Acts 1941, apply to amounts becoming due by officers or boards after the effective date of the act, which were earned by retired assessors of taxes and tax collectors before the act's date, and which otherwise would be paid directly into the county "excess fee" fund under authority of *Gay vs. State*, 155 So. 845?

(2) Should the excess income to be apportioned to boards of public instruction under Chapter 20891, Acts of 1941, by assessors of taxes and tax collectors, be calculated according to the amount of commissions paid to the officer for assessing all school taxes, including the commissions paid by the Board of County Commissioners, or should the apportionment be calculated according to the amount of commissions paid by the Board of Public Instruction?

To Hon. Bryan Willis, State Auditor:

(1) The first question should be answered in the negative. In my opinion, the balance of commissions withheld from tax assessors until the approval of the report of errors and double assessments, and the commissions withheld from tax collectors, where tax sales are made to the state, until sale or redemption of the tax sale certificates, are commissions for the year in which earned and should be considered as income for that year (opinion February 4, 1941). Such income belonged to the person who earned them, although he may have retired from office, and should be considered as his income of office, otherwise we would have two persons receiving income for the same period of time. To hold that such commissions were income of the incumbent of the office would be a denial of the vested rights of the person who earned the commissions.

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The fact that the retiring officer earned the full salary allowed him by law would not change the status of the commissions and they would be payable into the excess fee fund for the year in which earned.

(2) The excess income to be appropriated to the board of public instruction, under Chapter 20891, Acts of 1941, should be calculated according to the amount of commissions paid to the tax assessor and collector for assessing *all school taxes*, including commissions paid by the board of county commissioners, and should not be limited to the amount of commissions paid by the board of public instruction. The body of the Act clearly provides that the distribution is to be based upon all school taxes and not upon a part thereof and I find nothing in the Act, its preamble or otherwise, to justify a conclusion that the Legislature meant otherwise.

COMPENSATION OF COUNTY OFFICIALS

June 19, 1942.—042-306.

EXCESS FEES—TAX ASSESSORS AND COLLECTORS

QUESTION: Under Chapter 20891, Acts of 1941, should distribution of excess fees of Tax Collectors and Assessors to the Board of Public Instruction and the Board of County Commissioners be based on proportion of fees received for assessing and collecting school taxes upon the ratio that such proportion bears to all other fees and commissions received by said officials?

To Hon. Bryan Willis, State Auditor:

The total fees of the Tax Collector's Office, of Orange County, including auto tags, commissions on individual certificates, etc., amounted to \$33,911.23; the expenses of his office amounted to \$25,924.28, leaving the sum of \$7,986.95 as excess fees to be divided between the County Commissioners and the County School Board under the provisions of Chapter 20,891, Laws of Florida, Acts of 1941.

Of the Tax Collector's aforesaid receipts, the sum of \$8,118.55 was from commissions on school taxes, including commissions on General School Funds and this amount was divided by taking the \$8,118.55, being the commission of school taxes, and using the ratio that this bears to the total amount collected, which is the sum of \$33,911.23, in order to determine what part of the excess fees of \$7,986.95 the School Board was to receive. In other words, the Tax Collector took $811855/3391123$ of \$7,986.95, which represents the School Board's proportion of the total fees received by the Tax Collector's Office, which amounts to \$1,912.12.

This division seems to me to be strictly in accordance with the statute. I am, therefore, of the opinion that the Tax Collector made the proper distribution.

COUNTY TRAFFIC OFFICERS

August 25, 1941.—041-480.

ROAD PATROLMEN—REWARDS

QUESTION: Are road patrolmen, as deputy traffic officers of Dade County, precluded from Section 7 of Chapter 18396, Acts of 1937, from accepting a reward paid by a sister state for the apprehension of a fugitive from justice in Florida?

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To Hon. Albert D. Hubbard, Assistant County Solicitor, Miami, Florida:

Section 7 of Chapter 18396, Acts of 1937, provides:

"The compensation herein provided for shall be the only compensation which either the Chief Traffic Officer or the Deputy Traffic Officers shall be entitled to receive, and it shall be unlawful for any such officer to charge, collect or receive any compensation from any source other than the salary herein provided for."

The duties of the Deputy Traffic Officers as provided by said Act are to "patrol the roads of their respective Counties and enforce the traffic laws and regulations."

Under the Act such Deputy Traffic Officers are commissioned Deputy Sheriffs.

Section 7486, Compiled General Laws 1927, provides:

"It shall be unlawful for any officer, State, county or municipal, or any public appointee, or any deputy of any such officer or appointee, to exact or accept any reward, compensation, or other remuneration other than those provided by law, from any person whatsoever for the performance, non-performance or violation of any law, rule or regulation that may be incumbent upon the said officer or appointee to administer, respect, perform, execute or to have executed: Provided, that nothing herein shall be construed so as to preclude a sheriff or his deputies, city marshal or policeman from accepting rewards or remuneration for services performed in apprehending any criminal."

"Compensation" ordinarily means pay for services rendered, and it is sometimes held to be synonymous with salary and is so used in Chapter 18396, supra, whereas "reward" is commonly accepted as meaning a recompense or premium offered by the government or a private individual for special or extraordinary services.

It is my opinion therefore, that the prohibition in Section 7 of Chapter 18396, supra, is directed at unauthorized compensation gifts or remuneration for the performance or non-performance of the duties resting upon said deputy officer under said Act, and it does not apply to the acceptance of a reward for the apprehension of a fugitive from justice from a sister state.

COUNTY PUBLIC LIBRARIES

September 30, 1942.—042-471.

REFERENDUM ELECTION—EFFECT—PUTNAM COUNTY LIBRARY

QUESTION: Recently an election was held in Putnam County, Florida, under the provisions of Chapter 150, Florida Statutes 1941, relative to the establishment of a county free public library, in which election a majority vote was cast for rejection of the provisions of this law. Can a subsequent election be held under the provisions of Chapter 150, supra, and what effect, if any, has this election and the result thereof, held under the provisions of Chapter 150, supra, a general law, upon Chapter 18832, Special Acts of 1937, authorizing and empowering Putnam County to maintain and support a free library service throughout the county?

To Hon. W. T. Cash, State Librarian, State Library Board:

Chapter 150, Florida Statutes 1941, authorizes the establishment of a county free public library in any county of this State upon an elec-

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STATE LIBRARY**

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS—County Public Libraries

tion being held in any such county in which a majority of the votes cast shall be in favor of the acceptance of the provisions of this chapter. This chapter was first enacted as a law as Chapter 14756, General Acts of 1931, and subsequently re-enacted as Chapter 150, Florida Statutes 1941, by the adoption of the revision of the statutes at the 1941 session of the Legislature.

In construing a general law and a local or special law, both of which relate to the same subject-matter, a general law will not be construed to repeal or modify a special law embraced within its general terms, unless it is a general revision of the whole subject, or the two laws are so repugnant as to indicate a legislative intent that one should repeal or modify the other, and a special law is not repealed by a later general law unless the intent to repeal or modify is clearly shown. The Act adopting the revision of Florida Statutes 1941 specifically excludes all local or special laws from the operation thereof and, although Chapter 150, Florida Statutes 1941 (Chapter 14756, General Acts of 1931) is a general law, and is inconsistent with Chapter 18832, Special Acts of 1937, such inconsistencies are not repugnant or such as would alter or suspend the operation or effectiveness of either law.

Chapter 150, Florida Statutes 1941, in providing for a referendum election for the acceptance or rejection of the provisions of this chapter, does not fix any specific date or time for holding such election and places no limitation upon how often such an election may be held thereunder. It appears that the intent of this law was to provide that an election may be held at any time upon filing a petition with the Board of County Commissioners, signed by twenty-five percent of the qualified voters, requesting such election, and that it presupposes more than one election might be held in a county is implied by the following wording in Section 150.09 of this Chapter: "... if at any such election the majority of votes cast in such county shall be in favor of the acceptance of the provisions of this chapter, thereafter the provisions of this chapter shall be available and operative in said county, but not otherwise." In construing the provisions of any law providing for a referendum election, such provisions should be liberally construed and any doubt should be resolved in the favor of the exercise of this right by the people.

Chapter 18832, Special Acts of 1937, did not provide for a referendum election in order to make this law effective, and any attempted referendum election held in connection therewith would be a nullity. There is nothing contained in Chapter 150, Florida Statutes 1941, to indicate that the referendum election provided for therein would, or could, apply to any special or local law, or in fact to any law other than Chapter 150, *supra.*, itself.

I am, therefore, of the opinion that Chapter 150, Florida Statutes 1941 (Chapter 14756, General Acts of 1931), does not repeal, modify or affect Chapter 18832, Special Acts of 1937, and that neither of these laws alter or suspend the effectiveness of the other; that the referendum election held in Putnam County under the provisions of Chapter 150, Florida Statutes 1941, for the acceptance or rejection of this general law, in no-wise affected the existing county free library service previously established in Putnam County under the provisions of Chapter 18832, Special Acts of 1937; that the holding of a referendum election under the provisions of Chapter 150, Florida Statutes 1941, for the purpose of acceptance or rejection of this law in any county, does not preclude the holding of a subsequent referendum election thereunder for the same purpose in the same county.

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS—County Hospitals**COUNTY HOSPITALS**

February 17, 1942.—042-74.

BOND ELECTION—QUALIFICATION OF ELECTORS—ALACHUA COUNTY

QUESTION: On December 27, 1941, the Board of County Commissioners passed a resolution calling a special election in Alachua County to be held February 3, 1942, to determine whether or not bonds in the sum of \$100,000 should be issued for the purpose of enlarging and equipping the Alachua County Hospital. The election was duly advertised and held on February 3, 1942. The opening of the books for registration of qualified electors was advertised and the books opened. All proceedings were had in accordance with Chapter 14715, Acts of 1931, being Sections 457 (1) to 457 (19), Compiled General Laws, Permanent Supplement. Prior to the day of election the Supervisor of Registration prepared a list of persons that such registration officer concluded to be qualified electors. The Board of County Commissioners did not examine said list before the date of election. The results of the election are now ready to be canvassed. Upon an examination of the list of voters it was found that a large number of persons on such list were either dead, removed from the County or not owners of real estate. In determining the number of electors legally qualified to participate in said election as provided by Section 17 of Chapter 14715, Acts of 1931, does the Board have authority to disregard the names of those persons on the list prepared by the Supervisor of Registration who are either dead, removed from the County or not the owners of real estate? Can the Board of County Commissioners disregard the names of those persons who are disqualified and certify only the number found by them to be actually qualified whose names appear on the list?

To Hon. Spessard L. Holland, Governor:

It is my opinion that in the election held under Chapter 14715, Acts of 1931, in Alachua County to determine whether bonds in the sum of \$100,000 should be issued for the purpose of enlarging the Alachua County Hospital, the County Commissioners and the Supervisor of Registration can jointly at this time, after the holding of said election, strike from the list of qualified voters the names of any voters whom they jointly agree have been improperly placed on said list.

This is a striking which the court could command, and these officials can anticipate such judicial order by the doing of such act without such court order, provided, of course, that the names so stricken are actually and legally names of persons not legally qualified to vote.

CHAPTER X

CITIES AND TOWNS

POWERS OF MUNICIPALITIES

September 2, 1942.—042-431.

AUDIT—PETITION—"FLORIDA CITY"

QUESTION: What duty is imposed upon the Governor on receipt of petition for audit of "Florida City?"

To Hon. Spessard L. Holland, Governor:

I have examined the petition and am of the opinion that the same complies with Section 3089 C.G.L.—167.61 Florida Statutes, 1941, in that it appears by the certificate of Carl Holmer, Jr., who is the Supervisor of Registration of Dade County, Florida, although he describes himself as "the duly elected, qualified and acting Registrar of the County of Dade, State of Florida," to have been signed by "at least twenty per cent of the taxpaying electors" of the "said municipality."

The statute does not contain any specific provision as to the form of petition, by whom it shall be vouched for, or for any method by which the Governor shall determine the authenticity of such a petition.

The statute does say, however, that "whenever petitioned to do so by at least twenty per cent of the tax paying electors of any municipality" he, the Governor, "shall" direct the examination.

Giving the word "shall" its ordinary meaning there is, in my opinion, a mandatory duty imposed upon the Governor to direct the examination when he has received such a petition and is satisfied of its genuineness and authenticity.

CHAPTER XI

TAXATION AND FINANCE

GENERAL TAXATION PROVISIONS

August 12th, 1941.—041-445.

ASSESSMENTS—MUNICIPALLY OWNED WATER PLANT

QUESTION: The City of St. Petersburg purchased the Pinellas County Water Co. The water mains start in Hillsborough County, entering Pinellas County at the northeast corner of the county and continuing through the entire county to the St. Petersburg city limits. What part of the holdings are subject to taxation?

To Hon. J. M. Lee, Comptroller:

The municipally owned water mains passing through Pinellas County connecting with the water plant owned by the City of St. Petersburg are not subject to taxation.

For the purpose of this opinion, I assume that the water mains mentioned are merely for the purpose of carrying the water to the St. Petersburg city limits.

GENERAL TAXATION PROVISIONS

December 19, 1941.—041-690.

BONDS—CANCELLATION BY COUNTY COMMISSIONERS

QUESTION: (1) If, in a county in which school and other bonds have been used to pay taxes under the Futch Act, the County Commissioners and County Board of Public Instruction are agreed on a settlement, can the bonds which have thus been taken in be cancelled by proper resolution of the County Commissioners?

(2) What form of resolution should the Commissioners adopt in order to make possible the cancellation of such bonds?

To Hon. Colin English, State Superintendent of Public Instruction:

(1) Section 7 of Chapter 16252 of the Laws of Florida, 1933, commonly known as the "Futch Act" provides:

"... The bonds or matured interest coupons received in redemption of such lands shall be held by the Clerk of the Circuit Court uncanceled and proper account shall be kept thereof for adjustments of accounts between the county and such other taxing units or districts as may be interested at such time or times as the Board of County Commissioners may direct."

This provision contemplates the holding of the uncanceled bonds of the various taxing units of the county until adjustments of accounts between the county and such other taxing units have been made. After such adjustments have been made, the conclusion would naturally follow that the bonds involved may be cancelled by the Board of County Commissioners.

Accordingly, if the accounts have been adjusted between the Board of County Commissioners and the County Board of Public Instruction,

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as indicated in your first question, the bonds involved may be cancelled by proper resolutions of the Board of County Commissioners, in my opinion.

(2) In my opinion, the preamble of the resolution should set forth in detail the manner in which the adjustments of accounts have been made as between the Board of County Commissioners and the County Board of Public Instruction, and should set forth the reasons why such cancellation is desirable. The operative portion of the resolution should enumerate the bonds involved and should state that the bonds are considered as paid and that they are cancelled and no longer existent as legal obligations.

GENERAL TAXATION PROVISIONS

January 8, 1942.—042-11.

BONDS—CANCELLATION BY STATE TREASURER

QUESTION: The State Treasurer is in possession of two \$1,000.00 St. Lucie County, six per cent, Public Highway Bonds, Nos. 225 and 406, same being delivered to him pursuant to Chapter 15054, Acts of 1931, together with resolution of the Board of County Commissioners of St. Lucie County requesting cancellation of such bonds. The State Treasurer also is in possession of certificate by the Clerk of the Circuit Court of said County, Ex-officio Clerk of the Board of County Commissioners, stating in substance that there is no equity for State taxes in said bonds. What action should the Treasurer take in regard to such bonds?

To Hon. J. Edwin Larson, State Treasurer:

It is my opinion that, before you cancel the bonds in question or surrender them to the Board of County Commissioners of St. Lucie County, you have disclosed, by further resolution of said Commissioners, the following facts:

(1) That the bonds in question were duly and regularly accepted by said Board of Commissioners in full compliance and under the authorization of Chapter 15054, Laws of Florida, Acts of 1931.

(2) That the State's portion of the tax for which the bonds were accepted in payment thereof has been fully paid in cash and discharged.

(3) That no taxing district or political subdivision other than the County of St. Lucie has any interest in said bonds.

When you are in receipt of such a resolution, together with the resolution now in your possession, I see no reason why you may not cancel the bonds in question or surrender them to the Board of County Commissioners of St. Lucie County, Florida.

I deem it advisable that you secure the foregoing information and authorization because the resolution which the said Commissioners enacted on the 2nd day of December 1941 does not disclose under what provision of law these bonds were accepted nor does it show that the State's portion of the tax has been fully paid and discharged, the Clerk's certificate merely stating that the State *had no equity* in said bonds.

GENERAL TAXATION PROVISIONS

April 2, 1942.—042-159.

BONDS—CANCELLATION BY STATE TREASURER

QUESTION: Is the State Treasurer authorized to cancel bonds Nos. 96 and 97 of DeSoto County Special Road and Bridge District No. 6

TAXATION AND FINANCE—General Taxation Provisions

in compliance with resolution from the Glades County Board of Commissioners authorizing the State Board of Administration to cancel these bonds, where such bonds are not held by the State Board of Administration, but by the State Treasurer as custodian thereof under Chapter 15054, Acts of 1931?

To Hon. J. Edwin Larson, State Treasurer:

Section 7 of Chapter 15054, Acts of 1931, provides that:

"All bonds, interest coupons or other evidences of debt acquired and held under this Act by any County or District, shall be within thirty days thereafter forwarded to the State Treasurer who shall keep and hold the same for the account of the parties in interest, as custodian thereof. Municipalities shall by resolution designate some appropriate custodian to act in that capacity with reference to municipal bonds."

This chapter makes no provision of the disposition of such bonds by you as custodian thereof. Because of this deficiency in the Act, many counties have had special laws enacted authorizing the surrender or cancellation of such bonds by the State Treasurer.

Chapter 18546, Acts of 1937, is a Special Act applying to Glades County and specifically mentions bonds Nos. 96 and 97, *supra*, and authorizes the cancellation of such bonds. However, this Act does not provide who shall cancel said bonds, neither does it authorize you as the custodian thereof to surrender them to anyone for cancellation or otherwise.

Being unable to find any other applicable law which authorized such act on your part, it is my opinion that you have no authority to comply with the resolution referred to above.

It is my further opinion that you will need specific statutory authority to surrender these bonds which you now hold as custodian under Chapter 15054, Acts of 1931.

GENERAL TAXATION PROVISIONS

May 17, 1941.—041-265.

BONDS—EXCHANGE—REFUNDING

QUESTION: The Board of County Commissioners of Sarasota County has requested the State Treasurer to exchange bonds received by him, as custodian of various Sarasota County bonds, pursuant to Chapter 15054, Acts of 1931, for refunding bonds of the same taxing units. Would the State treasurer be authorized to effect such exchange?

To Hon. J. Edwin Larson, State Treasurer:

Chapter 15054, Laws of Florida, Acts of 1931, is an Act authorizing the acceptance of bonds or delinquent interest coupons or other delinquent obligations of counties, districts and municipalities at par, in redemption of lands from tax sales. You inform me that you are retaining in your possession a considerable number of bonds which have been received by you, as custodian, from Sarasota County, which bonds have been taken and accepted pursuant to this law, in lieu of cash, in payment of taxes.

House Bill No. 406, which became a law May 15, 1941, confers sufficient authority upon you, as custodian of funds of Sarasota County, to comply with the request of the Board of County Commissioners. Sections 1, 2 and 3 of House Bill No. 406 provide as follows:

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"Section 1. That all bonds heretofore used or accepted in settlement of taxes of County of Sarasota or any political or taxing or assessing district or subdivision thereof and now in the custody of the Treasurer of the State of Florida or the Clerk of the Circuit Court for Sarasota County, Florida, under the provisions of Chapter 15054, Acts of 1931, or Chapter 16252, Acts of 1933, Laws of Florida, or laws amendatory thereof, *are hereby declared to be an asset of the general fund of the County of Sarasota, State of Florida, and as such are subject to the management, direction and disposal of the Board of County Commissioners of said County.*

"Section 2. That said bonds are hereby found and declared to be refundable obligations of said County of Sarasota; and any or all of the same may be exchanged for similar refunding bonds issued by said County, upon the same terms and conditions generally applicable in respect to exchanges of like bonds privately owned or held.

"Section 3. The State Treasurer, the State Board of Administration and the Clerk of the Circuit Court of the County of Sarasota, severally, are hereby authorized (and it shall be their duty when thereto directed or requested by resolution of the Board of County Commissioners of said County), to assist in effecting any and all exchanges of said bonds as contemplated by this law. Such exchanges as may have been made prior to the passage of this Act are hereby fully ratified, approved and confirmed."

You will note that Section 1 declares all bonds heretofore used or accepted in settlement of taxes of the County of Sarasota, are to be an asset of the general fund of the County of Sarasota, and as such, are subject to the management, direction and disposal of the Board of County Commissioners. Section 2 declares that any bonds received are declared to be refundable obligations and may be exchanged for similar refunding bonds issued by Sarasota County. Section 3 authorizes the State Treasurer to assist in effecting any and all exchanges of said bonds which may be requested by the Board of County Commissioners. It is my opinion that House Bill No. 406 confers sufficient authority upon you, as State Treasurer to exchange, for appropriate refunding bonds of Sarasota County, any and all bonds which you are retaining. This law authorizes you, when directed by resolution of the Board of County Commissioners of Sarasota County, to deliver to the Board of County Commissioners of Sarasota County, refunding bonds of the same taxing units.

GENERAL TAXATION PROVISIONS

March 18, 1941.—041-117.

BONDS—SURRENDER BY STATE TREASURER

QUESTION: May the State Treasurer, as custodian of bonds accepted pursuant to Chapter 15054, Acts of 1931, deliver the said bonds to the Board of Administration for application to the investment account of the taxing unit entitled to same after receipt of proper resolution adopted by the Board of County Commissioners of the county affected and so authorizing?

To Hon. J. Edwin Larson, State Treasurer:

I call your attention to Chapter 15054, Acts of 1931, which was an act authorizing the acceptance and exchange of bonds or delinquent interest coupons or other delinquent obligations of counties, districts or municipalities at par in redemption of land from Tax Sales and in payment of other evidences of delinquent taxes due to same.

TAXATION AND FINANCE—General Taxation Provisions

Section 3 of said chapter provides:

"All bonds acquired and held under this Act shall be held with the matured and unmatured interest coupons thereof left intact thereon during the time such bonds are held, and all other evidences of indebtedness acquired under this Act and thereafter held, shall bear no interest during the time they are so held."

I call your attention to Section 7 of said Chapter which provides:

"All bonds, interest coupons or other evidences of debt acquired and held under this Act by any county or district, shall be within thirty days thereafter forwarded to the State Treasurer who keeps and holds the same for the account of the parties in interest, as custodian thereof . . ."

There is no provision in the law as to your disposition of these bonds that have been deposited with you as custodian under the provisions of said chapter.

It is my opinion that you are unauthorized to deliver these bonds to the Board of Administration or to anyone, but must hold the same as custodian thereof.

GENERAL TAXATION PROVISIONS

May 30, 1941.—041-294.

COMMISSIONS—TAX COLLECTORS

QUESTION: Is the Tax Collector's Commission to be collected in the sales made by the Internal Improvement Fund of lands going back to the State under the Murphy Law?

To Mrs. Mary M. Gwynn, Clerk Circuit Court, DeSoto County, Arcadia, Florida:

In *Cone, Governor, et al. v. King*, 196 So. 697, 143 Fla. 323, a County tax collector brought an action to enjoin and restrain the Trustees of the Internal Improvement Fund from selling or disposing of any lands subject to the Murphy Act until such time as he had been paid his commissions as Tax Collector on unredeemed tax certificates.

The bill charged "that said Section 9 of Chapter 18296, Acts of 1937, is unconstitutional and null and void in that it violates the constitutional rights of the plaintiff in taking away from him without due process of law his right of the collection of such commissions so due him and impairs the obligations of his contract for the payment of such commissions."

The Florida Supreme Court, in its opinion on said appeal, states as follows:

"The constitution commands that 'the Legislature shall provide for the election . . . in each county of . . . a Tax Collector' and other named county officers and that 'their . . . duties and compensation shall be prescribed by law.' Sec. 6, Art. VIII." As the duties and compensation of such officers are, under the constitution, prescribed by law, such duties and compensation are statutory and not contractual; therefore plaintiff officer has no vested right to commissions against a subsequent statute vesting title to the lands in the State without the right of redemption. Chapter 18296 makes no provision for the payment of commissions, but does not impair any vested right of the officer. In this case the statute provides that the 'tax collector shall not be entitled to any commission for the sale of such property made to the State of Florida until said commission is paid upon the redemption or sale of

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the tax certificate or certificates issued thereon to the State.' Comp. Gen. Laws Supp. §970.

"The tax certificates covered by Chapter 18296 have not been redeemed or sold, therefore the contingencies on which the commissions were to be paid have not occurred.

"The lands described in the tax sale certificates that were held by the State and covered by Chapter 18296, which were not sold under Chapter 18296, became vested, without privilege of redemption, on June 9, 1939."

It is my opinion that this decision is authority that you shall not collect tax collector's commissions on any sales made by the Trustees of the Internal Improvement Fund under Section 9, Chapter 18296, Laws of Florida, Acts of 1937 (the Murphy Act).

GENERAL TAXATION PROVISIONS

November 23, 1942.—042-533.

EXEMPTION—INSANE PERSON

QUESTION: Is a person adjudged insane entitled to exemption of five hundred dollars (\$500.00) from taxation as provided under Article IX, Section 9, of the Constitution of Florida, and if entitled to any tax exemption, what is his remedy?

To Hon. F. C. Elliot, Secretary, Trustees Internal Improvement Fund:

Article IX, Section 9 of the Constitution of Florida, provides as follows:

"SECTION 9. PROPERTY EXEMPT FROM TAXATION; WIDOWS AND DISABLED PERSONS.—There shall be exempt from taxation property to the value of five hundred dollars to every widow and to every person who is a bona fide resident of the State and has lost a limb or been disabled in war or by misfortune."

It is my opinion that a person who is a bona fide resident of this State and who has been legally adjudged insane, is a person who has been disabled by misfortune and is entitled to the exemption provided in said section.

It is also my opinion that where proper and satisfactory proof has been made to you and to the Comptroller, as provided by Chapter 194.36, Florida Statutes 1941, the Trustees of the Internal Improvement Fund, on consideration thereof, are authorized to determine such property never vested in the State in fact because of the special equity of the owner, and the certificates may be cancelled provided the assessed valuation of the property did not exceed \$500.00.

It is also my opinion that the exemption is allowable even though not claimed for the years in which the taxes were assessed if, in fact, the owner was entitled to the exemption.

GENERAL TAXATION PROVISIONS

May 20, 1941.—041-277.

EXEMPTION—PHILANTHROPY

QUESTION: An individual by the name of Louis A. Jacobsen has title to certain property in Pinellas County, the deed for same having

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been recorded in Deed Book 862, page 326, and dated July 29, 1940; said person is President of the Evangel Bible Institute and Scripture Mission. The officers and workers connected with said organization receive no salary, only living expenses. The Vice President and members of the council give of their time, advice and assistance without any compensation whatever. The Evangel Bible Institute and Scripture Mission was organized to meet the growing menace of Communism and other un-American, subversive forces in the south.

The plans to meet these un-American attacks call for the construction of a dormitory to house Christian Negro students, who will be given special training in the principles of Christianity and 100% Americanism. The property in said deed above referred to is the home of the Evangel Bible Institute and Scripture Mission, a Christian benevolent institution. Legal action is being taken and this institution is now in process of organization as a non-profit, philanthropic work. Under the facts submitted, is the property referred to exempt from taxation?

To Hon. Chas. A. Wilcox, Tax Assessor, Pinellas County, Clearwater, Florida:

The pertinent part of Section 897, Compiled General Laws of Florida, 1927, 1940 Parts, provides:

"Third—Such property of educational, literary, benevolent, fraternal, charitable and scientific institutions within this State as shall be actually occupied and used by them for the purpose for which they have been or may be organized . . ."

The Supreme Court of Florida in the case of University Club v. Lanier, Tax Collector, et al., 119 Fla. 146, 161 So. 78, held:

"Only property which is held and used exclusively for religious, scientific, municipal, educational, literary, or charitable purposes is exempt from taxation,"

and further the Court said:

"Generally, exemption from taxation is determined by use and ownership of property, and not altogether by charter of particular institution."

It is clear from this decision that the property upon which the exemption is claimed must be owned by an institution engaged in the work provided for in the statute. It is not necessary to determine whether or not the facts bring it within the meaning of an educational, literary, benevolent, fraternal, charitable or scientific institution because the title is not in the Evangel Bible Institute and Scripture Mission but is in Louis A. Jacobsen, and that an individual cannot be an institution has been well settled by the authorities. See Words and Phrases, Permanent Edition 21, Institution, and particularly this quotation:

"'Institution,' as used in Rev. Code 1899, §1180, providing that all buildings belonging to institutions of purely public charity shall be exempt from taxation, will not be held to include an individual or natural person, and hence property owned by such person is not exempt. Engstad v. Grand Forks County, 84 N.W. 577, 578, 10 N.D. 54."

I, therefore, am of the opinion that since title to this property is vested in an individual, the claim for taxation upon same regardless of the use to which it is put should not be allowed. If the Evangel Bible Institute and Scripture Mission becomes a non-profit corporation and the property mentioned is deeded to such non-profit corporation, I will be glad to consider the matter again if you so desire.

TAXATION AND FINANCE—General Taxation Provisions**GENERAL TAXATION PROVISIONS**

February 20, 1941.—041-80.

EXEMPTION—PRIVATE SCHOOL

QUESTION: Where property is owned by an individual, record title being in the individual's name, who also resides upon the property, operating a private boarding school thereon, the buildings on the property being occupied as class rooms and dormitories to house the students, the school owner's family also residing on the same property, is such property exempt from taxation?

To Hon. W. Homer Smith, Tax Assessor, DeLand, Florida:

(1) The property would not be exempt from taxation, because of its use for school and educational purposes, because the owner of same is an individual.

(2) Your statement concerning its factual status does not show that the property's school use was a use for which it was originally organized or intended.

(3) Your factual status of the property does not show any conclusive set of facts existing with respect to the property, that makes it come within the school exemption ad valorem real property requirement.

I cannot see where the property would be exempt as a homestead to its owner or occupant, because you have not made clear the facts existing with respect to the residence of said owner nor whether he is the head of a family, within the purview of our homestead exemption requirements.

GENERAL TAXATION PROVISIONS

December 15, 1942.—042-561.

EXEMPTION—PROPERTY UNDER EASEMENT TO FEDERAL GOVERNMENT

QUESTION: Should property under lease to the Federal Government be exempt from taxation:

To Hon. James M. Owens, Jr., Tax Assessor, West Palm Beach, Florida:

I wish to advise that I know of no decision or statute that would permit you to exempt this property from taxation. Title to same is not passed to the federal government and the grantors reserve unto themselves the right to use the land so long as they do not interfere with the easement conveyed to the government. I, therefore, answer your question in the negative.

GENERAL TAXATION PROVISIONS

January 5, 1942.—042-7.

PUBLIC LANDS—EXEMPTION

QUESTION: (1) Are State Forest and State Park lands subject to taxation for school bond assessment if the bonds were authorized before our Department took title to the land?

(2) Are State Forest and State Park lands subject to taxation for school bond assessment in case the bonds were authorized after the lands were acquired and listed with the County Tax Assessor?

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To Hon. H. J. Malsberger, State Forester and Park Executive:

(1) I am of the opinion that if all taxes then a lien upon the property were paid at the time the property was conveyed to the State, there would be no further liability for taxes. See:

State ex rel. Woman's Benevolent Association vs. Port of Palm Beach District. 164 So. 851.

United States vs. Anderson Cottonwood Irrigation District. 19 F. Sup. 740.

Mullen Benevolent Corporation vs. United States. 290 U. S. 89, 78 L. Ed. 192.

Blake vs. City of Tampa, 156 So. 97.

City of Portland vs. Multnomah County, (Oregon), 296 P. 48.

Cooley on Taxation. Vol. 2, Fourth Edition Par. 626.

(2) I am of the opinion that there would be no liability for taxation for school bond assessments where bonds were authorized after the State acquired title to the land.

In this connection I might call your attention to Chapter 15639, Laws of Florida, Acts of 1931. Section 1 provides:

"No taxes or special assessments shall be levied by any taxing district, special taxing district, or other governmental unit or agency created for purpose of taxation, against lands or other property of the State of Florida, except for the purpose of improving the actual physical condition of such lands or other property, and for such purpose, only upon the approval of such levy by that state agency or department in which title to such lands or other property is vested, or having jurisdiction over such lands or other property."

GENERAL TAXATION PROVISIONS

March 12, 1941.—041-126.

EXEMPTION—WIDOW

QUESTION: Does the amendment to Section 9 of Article IX of the Florida Constitution exempting property of every widow of the value of \$500.00 from taxation apply to an undivided one-third interest in real property owned by such widow?

To Hon. J. M. Lee, State Comptroller:

This office, on December 10, 1931, held:

"If there is any method by which the assessment can be properly made as to the other two-thirds, I can see no legal objection to applying the exemption to the widows undivided one-third interest."

The Constitutional provision with reference to widows in force on December 10, 1931, the date of said opinion, was:

"There shall be exempt from taxation property to the value of Five Hundred Dollars to every widow that has a family dependent upon her for support . . ." Article IX, Section 9.

The Constitutional Amendment adopted at the last General Election relating to widows provides:

"There shall be exempt from taxation property to the value of Five Hundred Dollars to every widow . . ." Article IX, Section 9 as amended.

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You will, therefore, observe that the Constitutional Amendment adopted at the last General Election liberalized the provisions thereto relating to a widow by omitting the following:

“ . . . that has a family dependent upon her for support.”

And now a widow is entitled to the exemption provided in said Amendment to Section 9 of Article IX regardless of whether or not she has a family dependent upon her for support.

It was, therefore, the intention of the Legislature in submitting said Amendment to the people and of the people in adopting the same, to make the provisions of said Section 9 of Article IX more favorable to a widow, and it certainly did not restrict the application of the law in any wise.

I, therefore, cannot see how this Amendment in any manner affected the opinion of this office dated December 10, 1931.

GENERAL TAXATION PROVISIONS

February 10, 1941.—041-59.

EXEMPTION—WIDOWS AND DISABLED WAR VETERANS

QUESTION: To what exemptions are widows and disabled war veterans as such entitled?

To Hon. Lester Summersill, County Attorney, Mayo, Florida:

(1) AS TO WIDOWS:

Under the 1940 Amendment to Article IX, Section 9, of our State Constitution, a widow is entitled to the five hundred dollar exemption, provided for in said Article and Section, without having any family dependent upon her for support. If she is a widow, she is entitled to the exemption. Of course, she must also be a resident of the State.

(2) AS TO DISABLED WAR VETERANS, ETC.:

As to any person who has lost a limb or disabled in war, or by misfortune, such person, and persons, is, and are, entitled to an exemption from taxation property to the value of five hundred dollars.

These exemption provisions do not mean that widows and disabled persons are entirely exempt from taxation.

GENERAL TAXATION PROVISIONS

February 9, 1942.—042-72.

EXTINGUISHMENT OF LIEN—STATE LAND

QUESTION: On March 12, 1928, the State Board of Education sold certain lands to one C. F. Dodson for the sum of \$3994.78, of which sum \$2157.43 was paid in cash and the balance due was evidenced by certain notes executed by Mr. Dodson which were secured by a mortgage on such lands. By reason of the non-payment of state and county taxes on these lands by Mr. Dodson they reverted to the State of Florida under the terms of the so-called Murphy Act and were later sold to one H. C. Dozier, Jr. Has the equity of the State Board of Education in these lands been extinguished?

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To Hon. Nathan Mayo, Commissioner of Agriculture:

I assume that the Trustees of the Internal Improvement Fund, under the provisions of the Murphy Act, conveyed these lands to Mr. Dozier.

The lands involved are a part of the "16th Section" or school lands granted to the State of Florida by the United States by Act of Congress approved March 3, 1845, for "the purpose of Education." This Act of Congress was in the nature of a solemn compact between the United States and the State of Florida (State vs. Jennings, 35 So. 986).

Section 4, Article XII, of the Constitution of Florida, 1885, provides that the State School Fund shall be derived from certain specified sources, among which are:

"The proceeds of all lands that have been or may hereafter be granted to the State by the United States for public school purposes."

Section 5, Article XII, of the Constitution of Florida directs that:

"The principal of the State School Fund shall remain sacred and inviolate."

The proceeds derived from the sale of school lands therefore becomes a part of this sacred and inviolate fund.

In the instant case a mortgage was accepted by the State Board of Education as part payment for the lands which was a specific lien upon the lands involved, and this mortgage became a part of the Public School Fund.

Chapter 18296, Acts of 1937, (Murphy Act), purports to extinguish all liens against property reverting to the State of Florida under the provisions of the Act.

The title of the State acquired under the provisions of the Murphy Act is based upon its liens for taxes and such liens have no constitutional recognition as such but are mere creatures of statute.

The vesting of title in the State under the provisions of the Murphy Act undoubtedly extinguished all private contract claims and liens against such lands. However, the lien and claim of the State Board of Education is not a private lien or claim but is a claim of the State of Florida, and in view of the sacred nature of the School Fund as proclaimed by our State Constitution, I do not believe that it was the intention of the Legislature in enacting the Murphy Law to extinguish such a lien or claim. If the Murphy Act extinguishes the lien of the State Board of Education it not only violates the compact between the United States and the State of Florida (Act of March 3, 1845), but it also violates Article XII of the Constitution of the State of Florida because the mortgage of the State Board of Education would thereby be rendered worthless and the State School Fund would be violated. Furthermore, the Legislature of Florida in 1931, enacted Chapter 15641, Section I of which provides that when any state lands are sold and a part of the purchase price is represented by a mortgage or other instrument obligating such lands for the payment of the balance due, the equity and interest of the State or the State agency making such sale as represented by such mortgage or other instrument, shall never be extinguished, cancelled or impaired so long as the obligation to the State or such State agency remains unpaid or unfulfilled.

The effect of this Act is to create a lien in favor of the State which can only be extinguished by payment. From the language of this statute it is apparent that the Legislature intended that the lien thereby created should be at least equal if not superior to liens for general taxes.

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The Murphy Act does not specifically repeal the Act of 1931, nor do I believe that the 1931 Act is necessarily repealed by implication. It deals with a particular class of liens in favor of the State and there is nothing in the language of the Murphy Act which necessarily conflicts with its provisions, except the general language that upon the vesting of title in the State:

"... every right, title or interest of every nature or kind whatsoever of former owner of said property, or anyone claiming by, through, or under him, or anyone holding liens thereon shall cease, terminate, and be at an end. . ."

The Supreme Court of Florida has held that this language does not destroy the tax lien of municipalities: *Bice vs. Haines City, et al.*, 195 So. 919, and it seems to me that the liens created by Chapter 15641, Acts of 1931, should be treated as at least equal in dignity if not superior to municipal tax liens.

It is therefore my opinion, that when the above described lands reverted to the State of Florida under the provisions of the Murphy Act, the State took title subject to the lien of the mortgage held by the State Board of Education, and therefore the purchaser of such lands from the Trustees of the Internal Improvement Fund took title thereto subject to the lien of this mortgage.

It is further my opinion that the mortgage now held by the State Board of Education is a valid lien upon these lands and may be foreclosed.

GENERAL TAXATION PROVISIONS

March 15, 1941.—041-138.

HOMESTEADS—EXEMPTION

QUESTION: If a person moves to Florida in November, 1940, from another State and buys a home in November, 1940, is he entitled to a homestead exemption in 1941?

To Hon. John M. Boring, Tax Assessor, Lee County, Fort Myers, Florida:

I wish to advise that the Constitutional Amendment adopted at the General Election on November 8, 1938, with reference to who was entitled to a Homestead Exemption provides:

"Every person who has the legal title or beneficial title in equity to real property in this State and *who resides thereon and in good faith makes the same his or her permanent home*, . . . shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars on the said home and contiguous real property . . ." Article X, Section 7.

You will note that this Section requires only that the legal title or beneficial title in real property must be vested in the person who claims the homestead exemption, and that such person must reside thereon and in good faith make the same his permanent home.

Therefore, if a person moves to the State of Florida in 1940 from another State and takes title as provided in the above quotation from our Constitution, and thereafter resides thereon with the intention of making such his permanent home and does so in good faith, such person would be entitled to the exemption.

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March 17, 1941.—041-163.

HOMESTEADS—EXEMPTION

QUESTION: Is the owner of a lease-hold estate created under a thirty year lease and issued under Class 3, Title I of the National Housing Act, eligible for homestead exemption?

To Federal Housing Administration, Jacksonville, Attention Hon. M. M. Parrish, State Director.

Section 7 of Article X of the Constitution of Florida, Amendment of 1938, provides in part as follows:

"Every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars on the said home and contiguous real property, as defined in Article 10, Section 1, of the Constitution, for the year 1939 and thereafter. . . ."

The exemption referred to in this section applies only when a person has the legal title or beneficial title in equity. The instrument in question is obviously a lease, with an option to purchase, and as such, would not pass legal title. Therefore, in order to secure homestead exemption, the lessee must have the beneficial title in equity.

A person acquires the beneficial title to land only when he has done everything to entitle him to a deed, and who, therefore, has the legal right to such deed, and all that remains to be done is to issue it. Until the lessee exercises his option to purchase by payment to the lessors of the purchase price pursuant to the terms of the lease, he does not acquire a beneficial title in equity which would entitle him to homestead exemption.

I regret to advise that the leasehold occupants under Class 3, Title I, of the National Housing Act, are not eligible for homestead exemption.

GENERAL TAXATION PROVISIONS

March 13, 1941.—041-129.

HOMESTEADS—EXEMPTION—BUSINESS

QUESTION: If a person has a Tourist Camp for a business, can all the buildings on the one-half acre be included in the exemption or only the one in which the owner resides? If a person has a business other than Tourist, yet has one or more houses for rent on his half-acre besides the one in which he resides, can these be included in the exemption, likewise, an apartment house?

To Hon. S. H. Shoenberger, Clerk, Town of Hallandale, Hallandale, Florida:

"... apartment houses, business houses or other rental houses located upon the land comprising the homestead are entitled to the exemption if rents from such rental properties are a part of the means of livelihood of the head of the family."

Opinion of this office dated February 7, 1941.

TAXATION AND FINANCE—General Taxation Provisions**GENERAL TAXATION PROVISIONS**

February 4, 1941.—041-35.

HOMESTEADS—EXEMPTION—COMMERCIAL USE

QUESTION: Is a person who lives in an adjoining city and rents his home to another party, entitled to homestead exemption?

To Hon. G. T. Alexander, City Clerk, High Springs, Florida:

We assume you refer to homestead exemption as allowed under Article X, Section 7, of the Constitution of Florida, amendment of 1938, which section provides in part as follows:

"Every person who has the legal title or beneficial title in equity to real property in this State *and who resides thereon* and in good faith makes the same his or her permanent home, *or the permanent home of another or others legally or naturally dependent upon said person*, shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of Five Thousand Dollars on the said home and contiguous real property, as defined in Article 10, Section 1, of the Constitution, for the year 1939 and thereafter . . ."

You will note that this section allows an exemption from taxation up to an assessed valuation of \$5,000.00 on the homestead of any person who resides thereon and in good faith makes the same their permanent home, or the permanent home of another or others legally or naturally dependent upon them. It appears from the facts as set forth in your letter that the owner neither resides in his home place, nor does he have same occupied by persons who are dependent upon him. His use of the homestead is purely one of a commercial purpose, renting same out for the profits that will inure to him.

When the head of a family removes himself and family from his homestead, and upon such removal, rents his homestead, then such rental is equivalent to a commercial use, which would preclude him from receiving the benefits of such homestead exemption as is provided for in the above mentioned section of the Constitution.

GENERAL TAXATION PROVISIONS

March 13, 1941.—041-131.

HOMESTEADS—EXEMPTION—NO AREA REDUCTION

QUESTION: Is there a stipulation in the Homestead Exemption Law which provides exemption on more than one-half acre inside an incorporation, if it was the homestead of an individual before the Town was incorporated?

To Hon. S. H. Shoenberger, Clerk, Town of Hallandale, Hallandale, Florida:

This question is answered by Section 5 of Article X of the Constitution. Said Section reads:

"Section 5: No homestead provided for in section one shall be reduced in area on account of its being subsequently included within the limits of an incorporated city or town, without the consent of the owner."

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GENERAL TAXATION PROVISIONS

February 3, 1941.—041-30.

HOMESTEADS—EXEMPTION—MILITARY SERVICE MEN

QUESTION: Where the head of a family is absent in military service and the property is rented for the support of his family, is he entitled to homestead exemption?

To Hon. J. M. Lee, Comptroller:

Please be advised that the residence requirements as set forth on page 78 of the Biennial Report of the Attorney General for the years 1935-1936, apply to Article X, Section 1, of the Constitution of Florida, which section is provided in part as follows:

"A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, *owned by the head of a family residing in this state*, together with one thousand dollars worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, . . . no judgment or decree or execution shall be a lien upon exempted property except as provided in this Article."

The Supreme Court of Florida has interpreted the residence requirement of this section in the case of *Murphy v. Farquhar*, 22 So. 681, as follows:

"A temporary absence in search of health or pleasure or in any other place for purposes of business will not deprive the homestead claimant of his right, unless it be apparent that there was a design of permanent abandonment."

The Supreme Court further declared, in the case of *Matthew v. Jeacle*, 55 So. 665, as follows:

"A permanent abandonment of the homestead as a bona fide home and place of permanent abode strips it of its homestead character."

The test appears to be whether or not the head of a family intended to permanently or temporarily abandon his homestead. We believe that the opinions as set forth on page 76 are still the law regarding residence required to secure homestead exemption in Florida.

Article X, Section 7, of the Constitution of Florida, was adopted as a constitutional amendment during November of 1938. Said section provides in part as follows:

"Every person who has the legal title or beneficial title in equity to real property in this state *and who resides thereon* and in good faith makes the same his or her permanent home, *or the permanent home of another or others legally or naturally dependent upon said person*, shall be entitled to an exception from all taxation, except for assessments for special benefits, up to the assessed valuation of Five Thousand Dollars on the said home and contiguous real property, as defined in Article 10, Section 1, of the constitution, for the year 1939 and thereafter. . . ."

You will note that this section allows an exemption from taxation up to an assessed valuation of \$5,000.00 on said homestead, and has no application to an exemption for the purpose of a judgment, decree or execution as referred to in Section 1, Article X, of the Constitution. The residence requirement under this section should be interpreted similarly to the interpretation given to Section 1, Article X. Therefore, if the head of a family enters the military service of the United States, and

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does not rent his homestead, his absence would not have the effect of interrupting such residence during his period of training and service in the armed forces of the United States, and he should, upon proper application, receive the benefit of homestead exemption.

In the event the head of a family should rent his homestead during his period of training and service, the question arises whether, by virtue of such action, the homestead character of his property would be prejudiced to the extent that he would not secure the benefits of the \$5,000.00 taxation exemption.

The Selective Training and Service Act as passed by Congress, and approved by the President of the United States on September 16, 1940, was an emergency measure made necessary in order to provide for, strengthen and expedite the National Defense under the conditions which are threatening the peace and security of the United States, and to enable the United States the more successfully to fulfill the requirements of the National Defense. Congress declared that it is imperative to increase and train the personnel of the armed forces, which shall include men between the ages of 21 and 36 at the time of registration. We believe in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service. It is essential that the strength of our armed forces be at all times maintained and assured.

Toward the end that our Country should be adequately protected and armed, those occupying the status as head of a family and sharing the responsibility of service in our armed forces, should not be prejudiced in any manner in their property or property rights. If it should be made to appear by affidavit of such head of a family that, because of his military service, his ability to maintain his homestead, is affected, and it, therefore, becomes necessary for said head of a family to remove his family to other quarters and use the income derived from the rental of his home place toward the support of his family, and such affidavit further indicates that such abandonment of residence in his home place is purely of a temporary character occasioned by his service in the armed forces of the United States, we believe, under such circumstances, that the homestead exemption should not be denied such head of a family. We believe that such absence should be treated as a permissible legal absence during such period of training and service in the land or naval forces.

If the head of a family should remove himself and family from his homestead, and such removal is not occasioned by entry in the military service of the United States, and upon such removal, rents his homestead, then such rental would be equivalent to a commercial use, which would preclude him from receiving the benefits of such homestead exemption, as is provided for in Section 7, Article X, of the Constitution of Florida.

GENERAL TAXATION PROVISIONS

December 16, 1942.—042-571.

HOMESTEADS—EXEMPTION—MILITARY SERVICE MEN

QUESTION: What procedure may be followed in allowing homestead exemption to men in military service who have not been able to make application for same?

To Hon. C. Howard Rowton, Department Adjutant, The American Legion, Palatka, Florida:

If the American Legion representatives will get with the various tax assessors over the State and give them a certified list of the service men

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who have homesteads but because of their service have not been in position to make application for same, it will be proper for the tax assessors in the emergency existing to accept such certificates from the American Legion and to grant the particular exemption claims. I believe it will be possible for the American Legion and the tax assessors to work together in the effort and endeavor in locating all of the men in service who are entitled to homestead exemption, and after their joint investigation for the American Legion to give to the tax assessors the necessary certificate of homestead entitlement. Should there occur instances where persons entitled to the homestead claim are overlooked, I assure you that both this office and the Comptroller's Office are in agreement in the matter with respect to the suggestions here made to such an extent that we would be able to take care of the omission and see that the homestead claimant was accorded his rights. All you will have to do in case such a thing should happen would be to notify this office and we will take the initiative in seeing that the assessment is cancelled.

I can state to you that if the American Legion would certify to the tax assessors in the various counties the names of the men it knows to be in the service and knows to be entitled to a homestead exemption under the Constitutional provision therefor, these tax assessors will be warranted in accepting such certificate and granting such exemption, and in the event any service man is overlooked, the assessment made against him will be removed whenever it is properly brought to my attention.

GENERAL TAXATION PROVISIONS

March 1, 1941.—041-102.

HOMESTEADS—MURPHY CERTIFICATES—INTEREST ON REDEMPTION

QUESTION: (1) Under Laws of Florida, Chapter 18296, Acts of 1937, House Bill No. 396 Section 11—Homesteads—does this mean Government Patent Lands Homesteaded or does it apply to persons who have homestead exemption under the Florida Law?

(2) What rate of interest must the owner of a homestead pay to redeem a Murphy Certificate, and from what date?

To Hon. H. T. Piety, Clerk Circuit Court, Highlands County, Sebring, Florida:

(1) This Section contemplates persons who have homestead exemption under our law.

(2) You will note that the Act provides:

"... the person who held title to said land on date said certificate became two years old or any grantee of such person, or their legal representative or anyone holding any lien ... shall have the right to redeem such land from any or all such tax certificates so sold by the payment to purchaser thereof the amount bid therefore plus 3% per annum from the date of such certificate together with all costs paid by such purchaser in connection with purchasing said certificate."

GENERAL TAXATION PROVISIONS

February 4, 1942.—042-59.

HOMESTEADS—INTERPRETATION

QUESTION: Under Chapter 13644, Section 20, Acts of 1929, what constitutes a homestead?

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To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

In my opinion a homestead under said Section is to be determined by the law that relates to homesteads being exempt from execution and not a homestead that may be exempt from taxation, because what now constitutes a homestead under exemption from taxation was not contemplated at the time of the enactment of Chapter 13644, *supra*. Therefore, in my opinion, a homestead as contemplated by said Chapter is a body of land not exceeding one hundred and sixty acres outside of an incorporated city or town, and not exceeding one-half acre within an incorporated city or town owned by the head of a family residing in this State. The ownership may be in part owned by the head of the family, (*Morgan v. Bailey*, 105 So. 143; *Milton v. Milton*, 58 So. 718). The law contemplates that the homestead shall be the actual residence of the head of the family, but this does not mean that temporary absence from the homestead, by reason of business or pleasure, constitutes an abandonment thereof. (*Matthews v. Jeacle*, 55 So. 865; *Lanier v. Lanier*, 116 So. 867.)

GENERAL TAXATION PROVISIONS

April 9, 1941.—041-188.

HOMESTEADS—TAXABILITY

QUESTION: Can taxes be legally levied against homesteads to retire a general fund indebtedness which was incurred prior to the homestead exemption amendment?

To Hon. W. M. Wainwright, State Auditor:

I must answer your question in the negative for the reason that the homestead exemption law did not contemplate that taxes of this kind should be continued regardless of the fact that the indebtedness was created before the exemption amendment. Our Supreme Court said in the case of *Long vs. St. John*, 170 So. 317:

"Where amendment to State Constitution exempts from taxation property which was theretofore required to be assessed for taxation, such organic exemption is controlling, and property so exempted is not subject to taxation, unless and to extent that exemption, if allowed, would violate contract clause or other provisions of Federal Constitution.

"Where bonds of taxing unit have been issued pursuant to valid statutes which require annual levy, assessment, and collection of taxes on taxable property in taxing unit, sufficient to pay bonds as covenanted under legal authority, taxable property at date bonds were issued and sold is referred to."

It is, therefore, apparent from this decision that the Supreme Court has held that homestead property can only be taxed where there is a contractual obligation so to do.

GENERAL TAXATION PROVISIONS

March 15, 1941.—041-137.

INDUSTRIAL PLANTS—EXEMPTION—SOAP MANUFACTURER

QUESTION: Article IX, Section 12 of the Constitution of Florida provides that industrial plants shall be exempt from taxation when they are engaged "primarily . . . in the manufacture of steel vessels, automobile tires, fabrics and textiles, wood pulp, paper, paper bags, fiber

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board, automobiles, automobile parts, aircraft, aircraft parts, glass and crockery manufacturers and the refining of sugar and oils, and including by-products or derivatives incident to the manufacture of any of the above products . . ." Is a manufacturer of soap exempt from taxation under such Section?

To Hon. W. S. Johnson, Manager, Jacksonville Chamber of Commerce, Jacksonville, Florida:

I find the definition of soap to be:

"An alkaline unctuous substance . . . usually produced by combining animal or vegetable fats with a base, as potash or soda . . ." Webster's Twentieth-Century Dictionary.

In view of the above definition, the question now to determine is whether or not soap comes within the meaning of any of the language of the above quoted Section of the Constitution. The nearest approach to this, in my opinion, would be the refining of oils for the reason that soap could probably contain what in non-technical language would be termed oil, since oil is defined to be:

"A neutral unctuous body usually formed within living animal or vegetable organisms and liquid at ordinary temperatures; it has a more or less viscid consistence; is insoluble in water, but dissolves in alcohol and more readily in ether; it takes fire when heated in air, burning with a more or less luminous flame. The oils are usually divided into the fat or fixed oils, and the volatile or essential oil . . ." Webster's Twentieth-Century Dictionary.

But when we add the word "refining" to the word "oil", I think we have an entirely different meaning for the reason that the word "refining" according to Webster's Twentieth-Century Dictionary means:

"Refine; refined; refining. 1. To bring or reduce to a pure state; to free from impurities; to free from sediment; to defecate; to clarify; to fine; as, to refine liquor, sugar, or the like. 2. To reduce from the ore; to free or separate from other metals or from dross or alloy; to bring to an uncompounded state."

And although a soap manufacturer might necessarily refine oil or buy oil that was already refined, I do not believe he would be primarily in the business of refining oil within the meaning of the foregoing Constitutional provision because his primary business would be the manufacture of soap.

The Supreme Court in the case of *City of Jacksonville vs. Continental Can Company*, 151 So. 489, in laying down rules to be followed in the construction of this Amendment said:

"The fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the framers and the people who adopted it . . . it is a well settled principle of construction that the construction should not be technical nor liberal, but the aim should be to give effect to the purpose indicated by a fair interpretation of the language, the natural signification of the words used in the order, and grammatical arrangement in which they have been placed. If the words thus regarded convey a definite meaning and involve no absurdity or contradiction between the parts of the same instrument, no construction is allowable."

I have followed such rules in arriving at the conclusions hereinbefore stated, and I, therefore, do not believe that a soap manufacturer would be entitled to the exemption provided in Article IX, Section 12 of the Constitution.

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GENERAL TAXATION PROVISIONS

August 28, 1941.—041-488.

MURPHY ACT FUNDS—DEPOSITS AND DISBURSEMENTS

QUESTION: Funds collected under the Murphy Act are deposited in the State Treasury by the Secretary to the Trustees of the Internal Improvement Fund and are there held in a special bank account. Disbursements are made by special checks signed by the State Treasurer and countersigned by the Secretary to the Trustees by vouchers presented to the Treasurer's office by the Secretary, certifying that such disbursements were properly authorized by the Trustees. Is this the proper method of handling these funds, or should deposits of such funds be certified to the Comptroller and made subject to the Comptroller's warrants like other miscellaneous state funds, and should such funds be deposited and maintained in a separate bank account?

To Hon. J. Edwin Larson, State Treasurer:

Section 24 of Article IV of the Constitution of Florida provides:

"Sec. 24. The Treasurer shall receive and keep all funds, bonds, and other securities, in such manner as may be prescribed by law, and shall disburse no funds, nor issue bonds, or other securities, except upon the order of the Comptroller, countersigned by the Governor, in such manner as shall be prescribed by law."

Section 165, Compiled General Laws, 1927, provides:

"165. Moneys paid on warrants.—The Treasurer shall pay all warrants on the treasury drawn by the Comptroller and countersigned by the Governor, and no moneys shall be paid out of the treasury except on such warrant."

I find no other statutory provisions governing the disbursement of State funds.

It is my opinion that proceeds and collections derived from the sales of lands by the State of Florida through the Trustees of the Internal Improvement Fund under Section 9 of Chapter 18296, Laws of Florida, Acts of 1937, deposited in the State Treasury, are subject to the provisions of Section 165, Compiled General Laws, 1927, above cited, and should be certified to the Comptroller and disbursed on warrants on the Treasury drawn by the Comptroller and countersigned by the Governor.

It is my further opinion that said funds should be deposited and maintained in a separate bank account.

GENERAL TAXATION PROVISIONS

July 23, 1941.—041-429.

MURPHY LAND—PURCHASE—CITY OF CHIPLEY

QUESTION: Chapter 20424, Acts of 1941, authorizes the Board of Trustees of the Internal Improvement Fund to sell to a municipality any land owned by such municipality in Florida at and prior to the time such land became vested in the State by the operation of the Murphy Act for the sum of \$1.00 as a consideration. However, in doing so, the Act ignores the interest of the State School Fund in this land. We have a request from the City of Chipley for conveyance to that City, in consideration of \$1.00, by the Trustees of the Internal Improvement Fund, of land in Washington County, certified by the Clerk of the Circuit

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Court of Washington County as having been owned by the City of Chipley at the time of the passing of title thereto to the State under Chapter 18296, Acts of 1937, known as the Murphy Act. May this request be legally complied with?

To Hon. F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:

It is my opinion that since this land sold at public auction to the highest bidder for \$52.50, this amount could be treated as its value, and that the State School Fund's interest in the land could be determined upon the basis of this appraisal. Article XII, Section 4, of the State Constitution fixes twenty-five percent of the sale of public lands owned by the State as the interest of the State School Fund in such lands. I am of the opinion that we can recognize Chapter 20424, Acts of 1941, as fixing the consideration to be paid by the municipality to the State for three-fourths of the *land's value*, which total value in this case I have said could be treated as being properly \$52.50.

It is my conclusion that the payment of \$1.00 by the City of Chipley for this three-fourths interest, and one-fourth of \$52.50 for the one-fourth school interest, would be the consideration that the City of Chipley ought to pay, in order to obtain its deed to this property under the Act referred to.

GENERAL TAXATION PROVISIONS

March 13, 1941.—041-130.

PUBLIC LANDS—TAXABILITY

QUESTION: May a municipality collect 1940 taxes on "Murphyized" property?

To Hon. S. H. Shoenberger, Clerk, Town of Hallandale, Hallandale, Florida:

I do not believe that you could collect 1940 city taxes on property, the title of which has passed to the State of Florida under Section 9 of the so-called Murphy Act, because title having vested in the State of Florida, the State is, therefore, the owner of the property and you cannot assess taxes against property held and owned by the State of Florida.

GENERAL TAXATION PROVISIONS

April 10, 1941.—041-192.

PUBLIC LANDS—TAXABILITY

QUESTION: Should lands that have reverted to the State under the Murphy Act, and been cleared by deed from the Trustees of the Internal Improvement Fund since January 1st, 1941, be included in current assessment for 1941 tax purposes?

To Hon. R. L. Green, Tax Assessor, Gadsden County, Quincy, Fla.:

The Murphy Act made no provision with reference to the above question, and, as you know, real property in which title is vested in the State cannot be taxed. Under Section 913, Compiled General Laws, 1927, Permanent Supplement, Volume 1, property can only be taxed provided that on January 1st of the taxable year it was then vested in some person subject to taxation.

It is, therefore, my opinion that lands that reverted to the State under the Murphy Act that have been cleared by deed from the Trustees of the Internal Improvement Fund since January 1st, 1941, should not be included upon your current assessment for 1941 tax purposes.

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GENERAL TAXATION PROVISIONS

April 2, 1942.—042-149.

PUBLIC LANDS—TAXABILITY

QUESTION: The Tax Collector of Alachua County is endeavoring to collect taxes upon land to which title is held by the State Board of Education. The Tax Collector's contention is that state owned property is subject to levy for debt service for bonds issued prior to acquisition of title to the property by the State. Is this contention correct?

To Hon. Colin English, State Superintendent of Public Instruction:

Property to which title is held by the State Board of Education is not subject to taxation for any purpose even though such property may have been subject to levy for debt service prior to acquisition by the State Board of Education.

At common law the public lands of a state are not subject to taxation while the title thereto remains in the state or one of its governmental departments or agencies. (61 C.J. 367). See, also, *Mullen Benevolent Corporation v. United States*, 290 U.S. 89 (1933); *Arkansas Southern Railway Company v. Louisiana and Arkansas Railway Company*, 218 U.S. 431 (1910). This arises, naturally, as one of the incidents of state sovereignty. This principle is confirmed in this state by statute. Section 897 C.G.L. 1927, which was originally enacted in 1895, provides: "The following property shall be exempt from taxation: First, all property, real and personal, of the United States and of this State."

Property held by the State Board of Education is state property and, accordingly, falls within the foregoing provision. (26 R.C.L. 331).

Since this property is not taxable, the State Board of Education cannot properly pay the taxes which the aforementioned tax collector is endeavoring to collect.

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October 16, 1941.—041-621.

**RELEASE OF CLAIM OF STATE—SOUTHWEST TAMPA STORM
SEWER DRAINAGE DISTRICT**

QUESTION: The Supervisors of the Southwest Tampa Storm Sewer Drainage District have asked Trustees of the Internal Improvement Fund to sell the district all the right, title and interest of the State in lands in the District acquired under the Murphy Act, for the sum of \$500.00. The appraised value of the State owned lands is \$41,532.00. Outstanding Drainage District taxes amount to \$154,751.10. The request to purchase is predicated on the theory that the lien for all State taxes has been canceled by the vesting of title under the Murphy Act, and the District needs the money due on the unpaid taxes to satisfy the claims of bondholders. Should this offer be accepted?

To Trustees of the Internal Improvement Fund:

I recommend that this offer be rejected for the following reasons:

1. In my opinion the lien for State taxes was not satisfied and canceled by the vesting of title in the State under the Murphy Act, and the same can be satisfied only by sale of said lands. Taking by United States through condemnation proceedings is the equivalent of sale.

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2. To accept the same, in my opinion, would be tantamount to making a gift to the District of State funds due the State above the amount of \$500.00 on valid tax liens, for which there is no authority.

3. Such would establish a dangerous precedent, as it would open the door to all Drainage Districts for making similar requests.

4. It appears from the Answer filed by the Drainage District in the condemnation suit that all Drainage District taxes remaining unpaid were levied under the general drainage Act and Section 1119 Revised General Statutes, 1920, as amended by Chapter 9129, Acts of 1923, which provided that:

"All drainage district taxes provided for in this Article, together with penalties, . . . from the date of assessment thereof until paid constitute a lien, *to which only the lien of the State for general State, County, School and Road taxes shall be paramount*, upon all the lands against which such taxes shall be levied as is provided in this Article."

Under said statute, State and County taxes being paramount and superior liens to the Drainage District taxes, said Drainage District taxes were cut off and canceled on June 9, 1939, by operation of the Murphy Act, and the State is entitled to the entire award for the taking of said lands, with the possible exception of maintenance taxes, to which reference is hereafter made.

5. Because the only taxes which, in my opinion, the Drainage District is entitled to have paid out of the award for said lands appraised at \$41,532.00, are the maintenance taxes provided for by Section 1139 Revised General Statutes, 1920, as amended by Chapter 9129, Acts of 1923, which were levied after the passage of Chapter 12040, Acts of 1927, which last Act made Drainage taxes of equal dignity with the lien for State and County taxes. Such maintenance taxes under said 1923 Act are subject to be used for the payment of State and County taxes on lands purchased or owned by said Drainage District.

GENERAL TAXATION PROVISIONS

March 27, 1941.—041-169.

**SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940—
APPLICATION**

QUESTION: Is it necessary for a person to be a citizen of the State of Florida to be entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 and should an affidavit that a person is in military service state also that the service man is a citizen of the State of Florida?

To Hon. Luther W. Cobbey, County Attorney, Hillsborough County, Tampa, Florida:

Section 500 of Article Five of the Soldiers' and Sailors' Civil Relief Act of 1940, makes no provision with regard to where the person called into military service may have his citizenship. It simply provides:

"The provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling, agricultural, or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid."

It, therefore, does not appear to me that it would be necessary for a person to be a citizen of the State of Florida to be entitled to the benefit of the provision of this Section provided he otherwise qualifies.

TAXATION AND FINANCE—General Taxation Provisions

You request me to advise you just how far "owns and occupies" should be interpreted in including property owned by a man in the service. You state:

"For instance, could he own a house and lot in Hillsborough County and a place of business in Pinellas County and have the taxes on both of them held up until after he returned from service."

It is my opinion that in the instance you mention, it would be proper for him to be accorded the benefits of the Act above referred to provided, as to the house and lot in Hillsborough County, it was at the commencement of his period of military service and still is occupied by his dependents; as to the business property, provided it was used for his business purposes at the commencement of his military services and is still being used for such purposes by his employees.

I do not believe the location of the dwelling house or the business house of a person in military service has anything to do with his being entitled to the benefit of the provisions of the said Soldiers' and Sailors' Civil Relief Act of 1940.

TAX ASSESSMENTS AND SALES

April 17, 1942.—042-194.

**DELINQUENT TAXES—COMPUTATION OF INTEREST—ADVERTISE-
MENT**

QUESTION: (1) Should the interest rate on delinquent taxes be added for the sixty-six (66) days from May 1st to July 6th, which would amount to 3 3/10%?

(2) Will the dates June 12th, 19th, 26th and July 3rd comply with the law for the advertising or should there be 28 days between the first advertisement and the sale?

To Hon. Murray Sams, State Attorney, DeLand, Florida:

Answering same seriatim the reply is in the affirmative.

(1) See Section 11, Chapter 20722, Acts of 1941.

(2) See *Watson, et al. versus Beacon Operating Co., Inc.*, 154 So. 866, wherein the court held:

"The provision that notice should be published once each week for four consecutive weeks certainly does not mean that it should be published at least 28 days prior to the date of sale."

TAX ASSESSMENTS AND SALES

November 18, 1941.—041-652.

**NAPOLEON B. BROWARD DRAINAGE DISTRICT—REDUCTION OF
MILLAGE**

QUESTION: Does Section 54 of Chapter 20722, Acts of 1941 require a proportionate reduction in the one mill tax levied by the Legislature by Chapter 11861, Acts of 1927?

To Hon. Spessard L. Holland, Governor:

The same situation exists in this instance as in the Everglades Drainage District, and this question is ruled by my opinion of September 6,

TAXATION AND FINANCE—Tax Assessments and Sales

1941, regarding the Everglades Drainage District Maintenance Tax. Chapter 20658, Laws of Florida, Acts of 1941, levies the maintenance tax that I had under consideration in the Everglades Drainage District. Chapter 11861 levies an annual tax of one mill in the Napoleon B. Broward Drainage District.

In answering your question regarding the Everglades Drainage District, I said that Section 54, of Chapter 20722, did not require a reduction in the millage levied by Chapter 20658, Acts of 1941, for the reason:

"Section 54 of Chapter 20722, contemplates that the governing board or authority of all taxing districts *whose taxes are assessed on the tax rolls prepared by the county tax assessors* shall, for the years 1941-1942 and 1942-43, reduce millages to be levied for those years from the millages levied for the fiscal year 1940-41, proportionately to the increase of the ratio of assessed value to the full cash value.

"Reduction of millage contemplated in Section 54 is tied to assessment rolls prepared on a basis of full cash value, and to taxing authorities of taxing districts, *whose taxes are assessed on the tax roll prepared by the county assessor.*' The Assessment in Section 7 of Chapter 20658, being the one-half mill administration tax for the Everglades Drainage District, is not upon a taxing district's property *'whose taxes are assessed on the tax roll prepared by the county assessor,'* but on the contrary the tax assessment of the district for administration purposes of a one-half mill is made in Section 7 of Chapter 20658 by the legislature itself, and there is no tax roll prepared by anybody constituting the basis of the record of this assessment."

I, therefore, answer your question in the negative.

TAX ASSESSMENTS AND SALES

January 29, 1942.—042-57.

SCHOOL TAXES—COMMISSIONS FOR ASSESSING AND COLLECTING

QUESTION: How should commissions be computed and paid for assessing and collecting the following school taxes: (1) county general fund taxes; (2) district current fund taxes, and (3) district interest and sinking fund taxes?

To Hon. Colin English, State Superintendent of Public Instruction:

The computation of such taxes is governed by Chapter 20936, Laws of Florida, 1941, in counties having a population of 40,000 or less, according to the last federal census, and by Chapter 17876, Laws of Florida, 1937, in larger counties. Besides these two general acts, there are a number of special acts relating to particular counties, none of which concerns Columbia County, the county mentioned in your inquiry. In the second part of my opinion to you of August 15, 1941, I explained the method of computing school taxes under Chapter 20936, Laws of Florida, 1941. The same method is prescribed under Chapter 17876, Laws of Florida, 1937.

The payment of commission for assessing and collecting school taxes is also governed by the same statutes. Chapter 17876, Laws of Florida, 1937 and Chapter 20936, Laws of Florida, 1941, both provide that the "commissions for assessing and for collecting the county taxes shall be audited and paid by the Boards of County Commissioners of the several Counties of this State." Inasmuch as no special reference is made to county general school fund taxes, these acts contemplate, in my opinion,

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that commissions for assessing and collecting such taxes must be paid by the Boards of County Commissioners from funds under their control.

The same acts provide:

"The commissions for assessing and for collecting all Special School District taxes shall be audited by the Board of Public Instruction of each respective county and taken out of the funds of the respective Special School Districts under its control and allowed and paid to the said Tax Assessors for assessing such taxes and to the tax collectors for collecting such taxes; . . ."

Accordingly, the County Board of Public Instruction must pay the commissions for assessing and collecting district fund taxes and district interest and sinking fund taxes out of the funds of the school district for which these taxes are assessed and collected.

TAX ASSESSMENTS AND SALES

February 13, 1941.—041-31.

TAX ASSESSORS AND COLLECTORS—COMMISSIONS

QUESTION: Various taxing units are indebted to former retiring tax assessors and collectors, which indebtedness will be paid during the current and subsequent years. Should such indebtedness, representing commissions earned by such officers during their tenure of office be considered income for the year in which received, if such officials had not, respectively, received the maximum compensation allowed for prior years, and what period of time constitutes a "year" as used in the statutes limiting fee officers' compensation?

To Hon. W. M. Wainwright, State Auditor:

I find that this Department has, under a previous administration, rendered an opinion to the effect that the "year" means a calendar year, beginning each January 1st and ending the following December 31st, and admitting the possibility of confusion, arising from any effort to interpret Chapter 17876, Acts of 1937.

That confusion has been created is apparent when one attempts to reconcile the provisions of the named statute with what must have been the intent of the sponsors of this legislation and the reasonableness, justice and practicability of its operation if literally construed.

However, I am of the view that the principal difficulty is attributable to the definition given the word "year" in the previous opinion referred to, coupled with a too literal and technical interpretation of those provisions obviously intended for the benefit of the officials in the matter of compensation, with the added failure to anticipate the situation which now confronts your Department; i. e., the calculation of income to which retiring officers are entitled. The last named deficiency, with due respect, is readily understandable because none had had occasion to apply the statute to conditions surrounding the ending of a term of office, as is now the case.

Without undertaking to deal at length with the matter of years and cycles of years as legally contemplated, it is my considered opinion that the word "year" as used in the statutes limiting the compensation which certain officials whose offices are what are commonly called "fee offices" are entitled to receive is to be treated as that period of time beginning on the first day of the term of office, the terms running in cycles of two years beginning on the Tuesday after the first Monday in January, 1889, and

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in cycles of four years beginning on the corresponding Tuesday in January of 1917 and each fourth year thereafter, the last and fourth year being of three hundred and sixty-five days, more or less, as the case may be.

I am of the further opinion that commissions to which such retiring officials are entitled and which have not been paid should be considered as income for the year, as above defined, in which earned,—as to assessors, when assessed, and as to collectors, when collected, in every case within the maximum income allowed such officials.

In other words, a tax assessor, whose duties are complete for any given year when the tax roll for that year is turned over to the tax collector, has become entitled to the compensation allowed him by law. When that compensation is actually paid to him is immaterial and depends upon other conditions in which he is in no sense responsible.

The case of a tax collector is different, in that his compensation is based upon collections. His right to commissions accrues only upon collection and the exact amount thereof is not ascertainable until the book is finally closed and settled for, which event, under the law, is supposed to precede the turning over to him of a new tax roll. Tax collectors' commissions, therefore, become payable in the year in which the same are earned by collection, as above stated, and should be so calculated in the matter of income as affecting the annual compensation to which such officials are entitled.

TAX ASSESSMENTS AND SALES

June 25, 1941.—041-345.

TAX ASSESSORS AND COLLECTORS—COMMISSIONS

QUESTION: The law allows the Tax Collector a commission of 2% for the collection of drainage taxes. In many districts which have been refinanced as to bonded indebtedness through Reconstruction Finance Corporation a reduction in the face amount of drainage taxes payable for certain years has been allowed to the property owners. In this district the reduction allowed for certain years has been 85% and, in other words, the property owner has been permitted to pay for such years at the rate of 15¢ upon the dollar of the face amount of taxes due. Is the tax collector allowed a commission of 2% upon the face amount of the tax bill or a commission of 2% upon actual amount of cash collected?

To Messrs. Mitchell, Smith & Mitchell, Attorneys-at-Law, Vero Beach, Fla.:

The bill that would have authorized me to give opinions to county officials did not become a law. I, therefore, can only advise you unofficially in the matter.

I believe that your question is fully answered by Section 1 of Chapter 17876, Acts of 1937. This Section provides:

“The Tax Assessors of the several counties of the State of Florida shall be entitled to receive upon the amount of all taxes assessed, and the Tax Collectors of the several counties of the State of Florida shall be entitled to receive upon the taxes collected, each respectively, the following commission . . .”

Under same, I am of the opinion that the Tax Collectors are only entitled to receive a commission upon the amount of the taxes actually collected. I understand that where this question has arisen in the past, the tax collectors have only charged a commission upon the amount actually collected.

TAXATION AND FINANCE—Tax Assessments and Sales**TAX ASSESSMENTS AND SALES**

July 3, 1941.—041-354.

TAX ASSESSORS AND COLLECTORS—COMMISSIONS

QUESTION: "Chapter 20936, Acts of 1941, provides that in counties whose assessed valuation is less than \$10,000,000.00 the county tax assessors and tax collectors shall be entitled to commissions for assessing and collecting taxes, respectively, 10% on the first \$5,000.00, 5% on the next \$5,000.00, and 3% on the balance of such assessments or collections."

When are the collectors and assessors entitled to start collecting commissions under the provisions of this Act?

To Hon. W. M. Wainwright, State Auditor:

In Section 3 it is provided that the Act take effect immediately upon its becoming a law with or without the Governor's approval. This Act became a law on June 13th, 1941.

I am, therefore, of the opinion that all tax assessors are entitled to commissions as provided in said Act upon all taxes assessed subsequent to the effective date of said Act, and that all tax collectors are entitled to commissions as provided in said Act on all taxes collected subsequent to the effective date of said Act.

TAX ASSESSMENTS AND SALES

August 15, 1941.—041-453.

TAX ASSESSORS AND COLLECTORS—COMMISSIONS

QUESTION: (1) Are the commissions and rate of compensation for Tax Assessors and Tax Collectors from taxes assessed and collected for school purposes regulated entirely by Chapter 17876, Laws of Florida, Acts of 1937, and Chapter 20936, Laws of Florida, Acts of 1941?

(2) Are Assessors and Collectors entitled to (a) commissions at 10 per cent on the first \$5,000 of all school taxes collected in the county or (b) 10 per cent on the first \$5,000 of county school taxes collected and, likewise, to commissions at the rate of 10 per cent on the first \$5,000 of school district taxes collected or (c) 10 per cent on the first \$5,000 of county school taxes collected and to 10 per cent on the first \$5,000 of school district taxes collected in each district or (d) to a commission of 10 per cent on the first \$5,000 of county school taxes collected, 10 per cent on the first \$5,000 collected from each district for the district current fund and, likewise, to 10 per cent for the first \$5,000 collected in each district for the district interest and sinking fund?

(3) Is the rate of commission on the second \$5,000 to be determined in accordance with this same principle, and similarly, is the rate of commission on any additional amount above the second \$5,000 to be determined in accordance with this same principle?

(4) Is the schedule of commissions for Tax Assessors and Collectors as set forth below correct for all counties:

10% on the first \$5,000.
5% on the next \$5,000.

In counties with less than \$26,000 assessed valuation, the rate shall be 10% on the first \$10,000, 10% on the next \$10,000 for assessing and collecting State taxes.

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2% on any other assessments or collections except: In counties with an assessed valuation of less than \$10,000,000 the rate on additional assessments or collections shall be 3%.

(5) Are Collectors entitled to commissions only on the taxes collected during the current year or may they receive commissions on delinquent taxes, such as on delinquent railroad or utility taxes collected through the office of the Comptroller?

To Hon. Colin English, Superintendent of Public Instruction:

(1) The Act itself answers this question. I quote:

"This Act shall not apply to any county having a population of more than 40,000 according to the last Federal census."

I might also add that even in such counties if there is a special act covering this matter, the following language of this Chapter is applicable:

"Nothing contained in this Act shall abrogate, modify, change or repeal any local or special law under which any county tax collector or tax assessor is compensated as such tax collector or tax assessor."

(2) This question is answered by Section 1 of this Act which provides:

"That the tax assessors of the several counties of the State of Florida shall be entitled to receive upon the amount of *all taxes assessed*, and the tax collectors of the several counties of the State of Florida shall be entitled to receive upon the *taxes collected*." (Emphasis supplied.)

Therefore, assessors and collectors are only entitled to receive the commissions specified based upon the total taxes assessed or collected as the case may be and not upon individual assessment of taxes for specific purposes.

(3) The above also answers Question (3).

(4) In reply I wish to advise that my answer to Question (1) answers this question except I might add that in addition to a population of less than 40,000 the total assessed value must be less than \$10,000,000, in which event the commission is 3% instead of 2% in those counties where the assessed value is less than \$10,000,000. I might also call your attention to the fact that there is no county in the State of Florida with an assessed valuation of less than \$26,000. This was apparently an error upon the part of the draftsmen of the bill. That particular part would, therefore, be of no importance.

(5) This Office has repeatedly held that tax collectors are not entitled to any commissions upon the collection of delinquent railroad taxes. Utility taxes are not collected by the tax collectors but are collected by the Comptroller.

TAX ASSESSMENTS AND SALES

November 21, 1941.—041-679.

TAX ASSESSORS AND COLLECTORS—COMPENSATION

QUESTION: What do the provisions of Chapter 20431, Acts of 1941 provide in regard to payment of compensation to Tax Assessors and Collectors?

To Hon. Bryan Willis, State Auditor:

This Act governs the compensation for those officials for the entire year of 1941 and consequently the amounts received for 1941 under the

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previous Act should be credited against the amounts payable under the provisions of Chapter 20431, upon the basis of the commissions due from January 1, 1941, at the rates provided in Section 2 of the Act. The commissions on the County General School Fund should be collected from the Board of Public Instruction, which should assume the payment of such commissions from January 1, 1941.

As I construe Chapter 20431, commissions should be first received in accordance with Section 2, and if such commissions are not sufficient to pay the amount of compensation provided in Section 1, then the balance may be paid out of the funds received from or through the Federal Government in accordance with the provisions of Section 3. If the commissions under Section 2 and the Federal funds under Section 3 are insufficient to pay the compensation provided in Section 1, then the deficit would become a general obligation to be paid by the Board of County Commissioners, which obligation would seem to be properly includable in the county budget for the succeeding year. If the commissions received should be insufficient, the commissions due by the Board of County Commissioners or the Board of Public Instruction should be taken into account before the deficit is made up by the receipts from the Federal Government.

In rendering this opinion, I do not, of course, pass upon the constitutionality of Chapter 20431.

TAX ASSESSMENTS AND SALES

July 16, 1942.—042-387.

TAX ASSESSORS AND COLLECTORS—COMPENSATION FOR COLLECTION EVERGLADES DRAINAGE DISTRICT TAXES

QUESTION: What law governs the compensation to be paid county tax assessors and collectors for their services in connection with the assessment and collection of Everglades Drainage District taxes?

To Hon. K. M. Throop, Treasurer, Everglades Drainage District, 1107 Biscayne Building, Miami, Florida:

In 1937 the Legislature of Florida enacted Chapter 17876, being an Act designating and fixing the compensation of the tax assessors and tax collectors of the several counties of the State of Florida. This Act fixed a schedule of fees to be paid tax assessors and collectors for assessing and collecting all State, County, Special School Districts, and all other tax district taxes, general and special, provided by law to be assessed by the assessors and collected by the collectors, excluding errors. Section 4 of this Act repealed all laws and parts of laws in conflict with its provisions.

In the case of Crooks, et al. vs. State, ex rel. Pierce County Tax Assessor, 194 So. 237, the Supreme Court of Florida considered the question of whether Chapter 17876, Acts of 1937, superseded and repealed Chapter 18538, Special Acts of 1937, which was a special act fixing the amount of compensation to be paid the county tax assessor of St. Lucie County, Florida, for his services in connection with the assessment of Fort Pierce Port District taxes, the Fort Pierce Port District being a Special Tax District, the limits of which were co-extensive with the limits of St. Lucie County.

In its opinion, the Court stated:

"It appears that the Legislature intended by the enactment of Chapter 17876, supra, a general revision of the compensation of tax

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assessors of the different counties of Florida, and at the same time define their duties and services, and in the same Act clearly set forth the taxing units of the counties where they are required to render services. The Acts are repugnant and irreconcilable in many important details and it is clear that the Legislature intended to repeal all laws and parts of laws in conflict with or repugnant to Chapter 17876, and in so doing repealed Chapter 18538, Special Acts of 1937, Laws of Florida. See State ex rel. First Savings & Trust Co. of Tampa v. Sholtz, 125 Fla. 361, 169 So. 849; Langston v. Lundsford, 122 Fla. 813, 165 So. 898; Sanders v. Howell, 73 Fla. 563, 74 So. 802; State ex rel. D'Alemberte v. Sanders, 79 Fla. 835, 85 So. 333; Stewart v. DeLand-Lake Helen S. R. & B. Dist., 71 Fla. 158, 71 So. 42; State v. Southern Land & Timber Co., 45 Fla. 374, 33 So. 999."

It is clear therefore that Chapter 17876, Acts of 1937, was intended to cover the entire field of the compensation to be allowed tax assessors and tax collectors of the several counties of the State of Florida for their services in connection with the assessment and collection of State, County, and District taxes, and repealed all repugnant or conflicting laws, general or special.

This Act was amended by Chapter 20936, Laws of Florida, Acts of 1941, by changing in part the amount of commissions to be paid assessors and collectors in counties having certain named assessed valuations and by adding thereto Section 1-A, which is as follows:

"Section 1 A. Nothing contained in this Act shall abrogate, modify, change or repeal any local or special law under which any County Tax Collector or County Tax Assessor is compensated as such Tax Collector or Tax Assessor."

The 1941 Act further provided that its provisions did not apply to any county having a population of more than 40,000 according to the last Federal census. These Acts, together with others relating to the same subject, have been revised and now appear as Section 193.65, Florida Statutes 1941. It appears from the revision that all counties in the State are divided into two classes, those having a population of 40,000 or less, and those having a population of more than 40,000, for the purpose of determining the amount of compensation to which county tax assessors and collectors are entitled.

It is my opinion that the provisions of Section 193.65, Florida Statutes 1941, are controlling and fix the amount of compensation to which county tax assessors and collectors are entitled for assessing and collecting Everglades Drainage District Taxes, in the absence of Special legislation dealing with the subject subsequent to the enactment of Chapter 17876, Acts of 1937.

TAX ASSESSMENTS AND SALES

September 17, 1942.—042-445.

TAX COLLECTOR—CHARGES—PUBLISHING TAX SALE LIST

QUESTION: Does Section 11 of Chapter 20722, Acts of 1941, constitute authority for the Board of Administration to pay from interest and sinking funds applicable to countywide and special road and bridge districts, the charges of Tax Collectors for publishing the tax sale list for 1941 taxes against countywide and special road and bridge district bonds administered by the Board of Administration?

To Hon. J. Edwin Larson, State Treasurer:

I construe the statute cited as requiring such charges as are incident to countywide bond issues to be paid out of the general revenue fund of

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the county, but that such as are incident to special road and bridge district bonds are payable out of the proceeds of ad valorem tax levies to service the district bonds.

TAX ASSESSMENTS AND SALES

April 2, 1942.—042-151.

TAX COLLECTOR—COLLECTION AND CANCELLATION OF TAXES

QUESTION: In the year 1927, taxes were levied against three lots now in local possession. The assessment was in the form of an interlineation between two other assessments, and for some reason or other one of my predecessors in office failed to advertise the property in the Tax Sale for that year, and consequently no certificate was issued. The land sold for taxes for the year 1928 and thereafter for a period of years until 1935, when the certificates were purchased by an individual and foreclosed. The Clerk made a certificate covering 1928 taxes and subsequent omitted taxes, and I am quite sure the party purchasing the tax certificates were under the impression that they were cleaning up all taxes against the property.

As the record now stands, the property is clear except for the 1927 tax. The landowner, because of the fact that no certificate was issued, was not able to avail himself of the several acts available under the many tax relief measures of the past several years. The land is unimproved, but the tax is very high due to the fact that in 1927 Sarasota property was still suffering from boom-time valuations. The land owner cannot redeem the property from the Clerk's office, because no tax certificate was issued and turned over to him.

(1) Has the Tax Collector authority to collect taxes levied for 1927 where no certificate was issued or was the tax lien cancelled by Chapter 20981, Acts of 1941?

(2) Could the Tax Collector advertise the property for sale for delinquent taxes?

To Hon. Chas. G. Strohmeyer, Tax Collector, County of Sarasota, Sarasota, Florida:

(1) I wish to advise that it is possible that the tax lien therein was cancelled by Chapter 20981, Acts of 1941. I suggest that you ascertain all of the facts and then you can determine whether or not Chapter 20981 applies. If you have any doubt in that respect the Comptroller can probably be of assistance to you.

(2) If this Chapter does not apply I am of the opinion that it would be proper for you to collect the taxes, without interest or penalty, since under the old law interest and penalty did not start until the tax certificate issued, or you could, after proper advertisement, hold a supplemental sale and issue a tax certificate.

TAX ASSESSMENTS AND SALES

April 15, 1941.—041-197.

TAX COLLECTOR—LEVY UNDER WARRANT

QUESTION: A tax collection warrant was issued in Dade County against R. C. Huffman Construction Company by Hon. Hayes Wood, Tax Collector of Dade County. Mr. Wood desires a levy made against personal property of this company in Pinellas County. Is the sheriff of

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Pinellas County authorized to levy upon property under a tax collection warrant issued from another county and then proceed with sale to satisfy that warrant?

To Hon. Todd Tucker, Sheriff, Pinellas County, Clearwater, Florida:

Unless there is a statute covering this subject, of course, there would be no authority for you to proceed in the matter. The only statute I have been able to find is Section 958, Compiled General Laws of 1927, which provides:

"Attachment of personalty in case of removal; assessment a lien on property; taxes assessed a judgment.—In case any personal property upon which the taxes shall have been assessed is removed from the county in which said property was assessed, it shall be lawful for the tax collector of the county, by his warrant, to authorize the sheriff of the county within this State to which such person shall have removed or in which he shall reside, and such sheriff may proceed thereon as upon execution from the circuit court. Any assessment of taxes shall be a lien upon the property assessed from the first day of January for which year the property is liable to assessment. The tax collectors of the several counties shall have power to attach for taxes thereon any personal property which has been assessed at any time before payment, if he has reason to believe that such property is being or has been removed or disposed of so as to prevent or endanger the payment of taxes thereon in the same manner and under the same rules of law governing attachments or debts, dues or demands in other cases; and all taxes assessed upon either real or personal property, from the date of such assessment, shall have all the force and effect of a judgment and execution at law against the owner of such property."

You will note that this statute is only applicable to personal property upon which taxes shall have been assessed where such personal property has been removed from the county in which said property was assessed. You would, therefore, not be authorized to proceed unless this fact existed and I think the statute should be strictly followed, and that you should have a warrant from the Tax Collector of Dade County addressed to you as provided in such Section. I do not believe the photostatic copy mentioned by you in your letter is sufficient.

TAX ASSESSMENTS AND SALES

October 30, 1942.—042-505.

TAX COLLECTOR—LIABILITY FOR COUNTY ATTORNEY'S FEE

QUESTION: What is the liability of Jay B. Starkey, tax collector of Pinellas county, Florida, for attorney's fees in the case of Carson vs. Starkey, lately pending in the Circuit Court of Pinellas county and in the Supreme Court?

To Hon. Bryan Willis, State Auditor:

An examination of the record in the above entitled cause reveals that the tax assessor of Pinellas county assessed certain intangible personal property of John F. Carson and Nell W. Carson and levied certain taxes against the same on the theory that it was taxable in said county. These cases ultimately reached the Supreme Court. Nothing appears from the record to indicate bad faith on the part of Mr. Starkey in attempting the collection of the said taxes. The proceedings were clearly against the tax collector in his official capacity and not in his individual capacity.

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Under the intangible tax laws in force when the assessment in question was made and under which it was made, all intangible taxes collected were payable into the general revenue fund of the state. No part thereof was payable to the county. The tax collector, when the taxes were collected, received only his fees for the collection amounting to about \$22.00.

If the county should pay this account from county funds it would be paying out county funds for other than county purposes. If the tax collector paid it out of the income of his office it would amount to either a payment by the county or by him personally; depending upon whether or not his office received a net annual amount in excess of his salary allowed by law. If the net income of the office was below the salary allowed the tax collector by law, payment of the attorney's fees would reduce the collector's salary by the amount paid, and if there were excess fees to be paid over its payment would reduce the county's excess fee fund by the same amount.

I am, therefore, of the opinion that the tax collector of Pinellas county is not legally obligated to pay any attorney's fees alleged to have been incurred in connection with the above suits, *unless he has obligated himself by his personal promise*. Pinellas county is not and cannot be legally obligated to pay any such attorney's fees, as the purposes of the defense were not for a county purpose. The excess fee fund of the county, from the tax collector's office, is likewise not legally obligated to pay any such attorney's fees, as the payment from such fund would in effect be a payment of county funds for other than county purposes.

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July 8, 1941.—041-374.

TAX COLLECTOR—TAX CERTIFICATES SIGNED BY DEPUTY

QUESTION: May tax certificates be signed by a Deputy Tax Collector or by a facsimile rubber stamp signature of the Tax Collector?

To Hon. J. M. Lee, Comptroller:

The Tax Collector may legally authorize his deputy to sign his (the Tax Collector) name to a tax certificate or the Tax Collector may authorize the signing of tax certificates by a facsimile rubber stamp signature of the Tax Collector.

In the case of Saussy et al. v. Northern Inv. Corporation, 165 So. 268, the exact question was raised as to whether or not the statutes authorize the signing of a tax certificate by a facsimile rubber stamp signature of the Tax Collector. While this particular question is not discussed at any great length in the opinion of the court in that case I procured the original transcript of record and I found that the proper predicate was laid in the lower court for the raising of this question in the Supreme Court. (See Page 52 and 76 of the transcript of record.) I find on Page 148 of the transcript of record that assignments 7, 8 and 9, 11, 12, 13 and 14 raise this question. The lower court had ruled against the contention of the defendants that the tax certificates were invalid for the reason that the signature of the tax collector was placed upon them by means of a stamp rather than the tax collector personally signing the same.

I have examined the briefs of the respective parties in the case. In appellants' brief question 7 that was submitted to the Court was as follows:

TAXATION AND FINANCE—Tax Assessments and Sales

"Do the statutes authorize the signing of tax certificates by a facsimile rubber stamp signature of the tax collector?"

One of the cases cited by the appellee to sustain his contention that it was proper for the Tax Collector to authorize his signature to be placed upon a tax certificate by means of a rubber stamp was the case of *Ranger Realty Co. v. Hefty*, 112 Fla. 654, 152 So. 439. The Supreme Court in disposing of several questions said that:

"Some of the questions argued by appellants in their briefs have no foundation for their consideration laid in the record of what was presented to and ruled on by the court below. *Practically all of the other questions have heretofore been decided adversely to appellants' contention in the following cases . . .*"

And among the cases cited by the Supreme Court was the case of *Ranger Realty Co. v. Hefty*, supra, and it is obvious, therefore, that the Supreme Court passed upon the question here presented, and held that it was proper for the Tax Collector to authorize the signing of his name by a facsimile rubber stamp signature of the tax collector. The Supreme Court in ending said opinion said further:

"The decree appealed from is without reversible error, and should be affirmed."

In view of what I have said above I overrule all previous opinions of this office to the contrary.

TAX ASSESSMENTS AND SALES

September 18, 1942.—042-452.

TAX COLLECTOR—WARRANT—EXECUTION AND SERVICE

QUESTION: Where a tax is levied on personal property removed from the taxing county, is Tax Collector authorized to execute warrant under Section 958, C.G.L. (Sec. 193.49, Florida Statutes, 1941), and is sheriff authorized to serve same?

To Hon. Spessard L. Holland, Governor:

Your questions seem to be covered by Section 958, C.G.L.; this being the applicable statute at the time the tax warrant was issued. It subsequently became Section 193.49, Florida Statutes 1941. I quote the same:

"Attachment of personalty in case of removal; assessment a lien on property; taxes assessed a judgment.—In case any personal property upon which the taxes shall have been assessed is removed from the county in which said property was assessed, it shall be lawful for the tax collector of the county, by his warrant, to authorize the sheriff of the county within this State to which such person shall have removed or in which he shall reside, and such sheriff may proceed thereon as upon execution from the circuit court. Any assessment of taxes shall be a lien upon the property assessed from the first day of January for which year the property is liable to assessment. The tax collectors of the several counties shall have power to attach for taxes thereon any, personal property which has been assessed at any time before payment, if he has reason to believe that such property is being or has been removed or disposed of so as to prevent or endanger the payment of taxes thereon in the same manner and under the same rules of law governing attachments or debts, dues or demands in other cases; and all taxes assessed upon either real or personal property, from the date of such assessment, shall have all the force and effect of a judgment and execution at law against the owner of such property."

TAXATION AND FINANCE—Tax Assessments and Sales

You will note that under certain circumstances mentioned in said Section, the Tax Collector is authorized to issue his warrant and the Sheriff is authorized to serve the same.

If the Tax Collector has strictly followed the statute and the Sheriff does likewise, I have not been able to find any case in the State of Florida that would hold either personally liable for having carried out the mandates of the statute. As a matter of fact, Section 4583 C.G.L. provides for a penalty in the event the Sheriff fails to execute any process legally issued and placed in his hands for service.

TAX ASSESSMENTS AND SALES

November 29, 1941.—041-667.

TAXES—DISCOUNT FOR PROMPT PAYMENT

QUESTION: Are taxpayers entitled to the discount of 4% for payment of taxes only in the month of November or for thirty days after the tax books have been made available to the public for payment of taxes?

To the Tax Collectors of the State of Florida:

This inquiry is pertinent this year because in the administration of new laws affecting the assessment and collection of ad valorem taxes, it has been necessary to revise the assessment of property in all counties and after such revision to obtain the approval of the Comptroller's office for the completed roll. In this transmission to the machinery established by the 1941 tax laws there has necessarily been some delay, making it impossible for the taxpayers of some counties to receive their tax bills by the 1st of November, even though taxes are due and payable as of that date.

Accordingly, we adopt and restate here an opinion of my honorable predecessor in the office of Attorney General dated May 18, 1933, which reads as follows:

Section 2 of Chapter 14572, Laws of Florida, Acts of 1929, was intended both for the benefit of the taxpayer and of the State and counties, first, to reward the diligent in the payment of taxes, and secondly, to secure for the government the funds for operating expenses.

The law makes taxes due November 1st, and it is contemplated that the tax rolls can be completed and in the hands of the tax assessors at that time. In view of this Section 2 of Chapter 14572 provides for discounts of 4% if taxes are paid during the month of November. I think it a reasonable construction to be placed thereon that the legislature intended the taxpayer to have 30 days from the time of the first opportunity for paying taxes, in which to get this discount.

It would be absurd to say that he could not have the discount because he didn't pay his taxes in November, when he was not given the opportunity by reason of no fault of his own. I think the taxpayer is entitled to the discount of 4% if he pays his taxes within thirty days from his first opportunity, to-wit: from the time the tax rolls are placed in the hands of the tax collector for that purpose, regardless as to when that is done. He should not be deprived of this right through no fault of his own.

TAXATION AND FINANCE--Tax Assessments and Sales**TAX ASSESSMENTS AND SALES**

February 21, 1942.—042-95.

TAXES—POSTPONEMENT OF PENALTIES

QUESTION: (1) Can the penalties imposed by the Act commencing on the first of April be postponed because the Tax Collector did not receive the tax roll until January 13?

(2) The Tax Collector of Escambia County did not receive the tax roll until January 13. Can the tax sale therefor be delayed in this particular year so that the sale can be held on the first Monday in August rather than the first Monday in June, as required by the 1941 law?

To Hon. Spessard L. Holland, Governor:

(1) On the 29th of November of last year this office rendered an opinion adopting a former opinion that had heretofore been rendered by this office regarding discount for prompt payment of taxes. In it I said, "I think the taxpayer is entitled to the discount of four per cent (4%) if he pays his taxes within thirty (30) days from his first opportunity to-wit: from the time the tax rolls are placed in the hands of the Tax Collector for that purpose regardless as to when that is done. He should not be deprived of this right through no fault of his own."

Therefore this question is answered in the affirmative, i.e., that the penalties imposed by law, commencing on the first of April, should, for this year, be postponed.

(2) The tax sale can be delayed this year so that the same be held on the first Monday in August rather than the first Monday in June, as required by the 1941 law.

In this connection I call your attention to the cases of Stieff vs. Hartwell, 35 Fla. 606; 17 So. 899 and Jenkins vs. Entzminger, 102 Fla. 167; 135 So. 785. These cases hold:

"A provision in the statute naming a time when an act is to be done in the assessment and collection of taxes is, as a general rule, considered a direction and not a limitation."

Obviously the delay will not invalidate the tax sale.

TAX ASSESSMENTS AND SALES

July 16, 1941.—041-375.

TAX SCHOOL DISTRICTS—REDUCTION OF MILLAGE

QUESTION: Where school district tax millage levies were voted in, November, 1939 for the biennium beginning July 1, 1940 and ending June 30, 1942, in accordance with the provisions of Chapter 19355, Acts of 1939, will it be possible for the county board of public instruction to reduce millage levies in those districts in 1941 in accordance with the provisions of Chapter 20722, Acts of 1941?

To Hon. Colin English, Superintendent of Public Instruction:

Millage levies in such districts may be reduced in accordance with the whole intent and purpose of Section 54 of Chapter 20722, Acts of 1941.

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TAX SALE CERTIFICATES AND TAX DEEDS

August 20, 1941.—041-463.

ERRONEOUS SALE—REFUND—CLERK CIRCUIT COURT

QUESTION: The Clerk of a circuit court included in a report submitted to the State Treasurer a certain tax sale certificate, together with a remittance therefor, this being in error, as it was in fact a second payment of the same item. What procedure should the clerk of said court follow in obtaining a refund for this item?

To Hon. J. Edwin Larson, State Treasurer:

If you are satisfied as to the correctness of the Clerk's report, have him prepare and submit to you a certificate under oath setting forth the facts, and upon receipt of same you may certify same for payment to the Comptroller.

My reason for so ruling is because of Chapter 18313, Laws of Florida, 1937, which provides that the true owner may have reimbursement of such funds upon proof of his right thereto according to the procedure provided in Section 5520, Compiled General Laws. I am not unmindful of our Supreme Court's ruling in the case of *State v. Knott*, 44 So. 744, wherein it held in construing Section 5520, supra, that the heir to an escheated estate would have to appear first and prove his right before the county judge and not before the State treasurer. I do not think it was the intent of the legislature to require a clerk of the circuit court to prove his claim before the county judge.

TAX SALE CERTIFICATES AND TAX DEEDS

July 23, 1941.—041-391.

MURPHY ACT—AUDIT OF CERTIFICATES

QUESTION: Under Section 1010, Compiled General Laws, 1927, is the State Auditor required to examine tax certificates held by the several clerks of the circuit courts where, under Chapter 18296, Acts of 1937 (Murphy Act), title to the land represented by same passed to the State of Florida?

To Hon. W. M. Wainwright, State Auditor:

Under Section 9 of Chapter 18296, Acts of 1937 (Murphy Act),

"... the fee simple title to all lands, against which there remains outstanding tax certificates which on the date this Act becomes a law, are more than two years old, shall become absolutely vested in State of Florida, and every right, title or interest of every nature or kind whatsoever of former owner of said property or anyone claiming by, through or under him, or anyone holding lien thereon shall cease, terminate and be at an end ..."

It is obvious that the fee simple title vested in the State of Florida under said Section of said Chapter. The tax certificates, therefore, ceased to exist as tax certificates under Section 1010, Compiled General Laws, and became only evidence of the State's title to the lands described in said tax certificates.

In view of the fact that the clerk of the circuit court can no longer accept redemptions of such tax certificates and therefore no money comes into his hands as clerk of the circuit court, he has no further accounting to do with reference to such certificates. If he acts in con-

TAXATION AND FINANCE—Tax Sale Certificates and Tax Deeds

nection with said certificates, he does so as agent of the Trustees of the Internal Improvement Fund, who, under Section 9 of the Murphy Act, are authorized to sell the same and his accounting would be upon the basis of the sale authorized to be made by the Trustees and to the Trustees and not by virtue of having possession of the tax certificates. I note that your Department continues to audit all funds received by the Trustees from the sale of lands covered by said certificates.

I, therefore, am of the opinion that it is no longer necessary for your Department to inspect tax certificates referred to herein under Section 1010, Compiled General Laws, 1927.

TAX SALE CERTIFICATES AND TAX DEEDS

August 27, 1942.—042-422.

MURPHY ACT—LOSS OF CERTIFICATE; EFFECT

QUESTION: Several tax sale certificates of the sales of 1933 and 1934 have been lost or misplaced and are not now in custody of the Clerk of the Circuit Court of Suwannee County. Did title to the lands embraced in these certificates vest in the State of Florida under the provisions of the taxing laws of Florida, and especially Chapter 18296, Laws of Florida, Acts of 1937 (Murphy Act), in view of the fact that these certificates can not now be found and have not yet been certified to the Trustees of the Internal Improvement Fund, as Murphy Act lands, by the Clerk of the Circuit Court?

To Trustees Internal Improvement Fund:

The forfeiture of title provided by the taxing laws is for non-payment of taxes. A tax sale certificate is not the tax lien but is evidence of the lien for taxes.

It is my opinion, therefore, that the loss of a tax sale certificate issued prior to June 9, 1935, did not defeat the vestiture of title to the lands embraced in such certificate in the State of Florida under the general taxing laws and the Murphy Act, in case, of course, the title to such lands would otherwise have vested.

TAX SALE CERTIFICATES AND TAX DEEDS

August 13, 1941.—041-446.

MURPHY ACT—1935 CERTIFICATES FOR 1933 TAX

QUESTION: Do certificates issued in the year 1935 for taxes for the year 1933, said certificates being in the hands of the State on June 9, 1939, vest title in the State under Chapter 18296, Acts of 1937?

To Hon. F. C. Elliot, Secretary, Trustees of Internal Improvement Fund:

The objects and purposes of Chapter 18296, Laws of Florida, Acts of 1937, are very clearly stated in Section 1 of said Act, which is in part as follows:

"Whereas, it is impossible for State and County Government to properly function with this enormous amount of property off the tax roll, and

"Whereas said certificates and subsequent omitted or levied taxes in hands of State of Florida and the right to collect from said land subsequent or omitted taxes is a dead, frozen and depreciated asset, and

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"Whereas these lands have been certified to the State for non-payment of taxes and in present condition are *rendering no revenue* in support of State, County or City Government, and

"Whereas it would be to best interest of State to sell these tax certificates that are more than two years old and subsequent omitted or levied taxes which sale would result in turning into Treasury of the State, and Counties a large amount of money and would further result in *placing said land back upon the tax roll.*"

In *State ex rel Hurner v. Culbreath*, 192 So. 814, 140 Fla. 634, the Florida Supreme Court, construing said Act, said:

Chapter 18296 "in effect said to the former owners if at any time within two years from the passage of this act, you will pay the cost of the sale of said certificates, you may have the privilege of redeeming your lands with all subsequent taxes remitted but that *if you fail in this the title of the State will become absolutely vested and sale thereof will be made by the trustees of the Internal Improvement Fund to the highest and best bidder for cash.*"

From the foregoing quoted paragraph of Section 1 of said Act and from Section 9, which declares the forfeiture to the State of Florida and authorizes the Trustees of the Internal Improvement Fund to sell said tax delinquent lands to the highest and best bidder for cash, as construed in *State ex rel. Hurner v. Culbreath*, supra, it clearly appears that if the owners or others interested did not redeem 1933 unpaid taxes within the two year period, as prescribed by the Act, that the legislature intended that the enormous amount of property off the tax rolls producing no revenue and existing as a dead, frozen and depreciated asset, should be forfeited to the State, sold by the Trustees of the Internal Improvement Fund, thereby placing said lands back on the tax rolls and made revenue producing.

In *State ex rel Garrett v. Gay*, 183 So. 463, 133 Fla. 826, an applicant to purchase tax sale certificates under Chapter 18296, by mandamus, sought to compel the sale of the lien for taxes levied for 1933 on which a sale was not made. The Florida Supreme Court held the applicant entitled to purchase the lien for 1933 taxes under said Act in spite of the fact that no tax sale certificates were issued for 1933 taxes. In its opinion the Court said:

"Section 8 of Chapter 18296, Acts of 1937, and Chapter 16252, Acts of 1933, as amended by Chapter 17400, Acts of 1935, both apply to certificates and *liens* or subsequent omitted taxes. It is admitted that the taxes for 1933 were regularly imposed and not paid and that no sale was made. *The statute makes them a lien which was subject to sale under Chapter 18296, Acts of 1937*, so the requested sale should have been made. As indicated by the return, the Clerk's reason for declining to make the sale was that no certificate had been issued. This is true but the taxes were assessed, the law made them a lien which is subject to sale in the manner requested."

In *State ex rel. Quintana v. Culbreath*, 179 So. 409, 131 Fla. 230, a bidder at tax certificate sale under Chapter 18296, by mandamus sought to compel the sale of taxes for 1937, although such taxes had not been levied on the property. After quoting from Section 3 of Chapter 18296, authorizing the sale of tax certificates to the highest and best bidder for cash, the Court said:

"The provision quoted shows clearly that the sale of the certificates should include subsequent taxes including the years for which the sale is made. *The fact that the taxes have not been levied is not a sufficient defence.*"

TAXATION AND FINANCE—Tax Sale Certificates and Tax Deeds

In *Messer v. Lang*, Clerk, 176 So. 548, the Supreme Court, in upholding the constitutionality of the Murphy Act, makes the following statement in its opinion:

"... Chapter 18296 is shown by its preamble and content to be nothing more than another step in what has been a consistent legislative policy beginning with chapter 14572, Acts of 1929, Ex. Sess., to purge the tax rolls of delinquent property held by the state for non-payment of taxes."

The foregoing opinions clearly indicate that Chapter 18296 was to be effective as to all lands tax delinquent for 1933 and prior years. All sections of said Chapter 18296, including Section 9, declaring the forfeiture and right of sale by the Trustees, must be construed together in an effort to effect the purposes of the Act.

While Section 3 of Chapter 18296 refers only to the sale of tax sale certificates, and if taxes on lands, which were not sold by the collector, are subject to sale thereunder even though no certificates were outstanding in the State for the reason that the lien was the controlling and determining fact, it must follow that the lien for 1933 taxes remaining unpaid must likewise be the controlling fact in determining whether title was vested and forfeited to the State under Section 9 of said Act.

There is no general statute which specifies the date on which sale by the collector shall be made of delinquent taxes. Many lands were sold for 1933 taxes before June 9, 1935, and where the tax sale certificates were not sold or redeemed before June 9, 1939, title to said tax delinquent lands on said date vested absolutely in the State.

To place a strict and technical construction on the words of Section 9 of said Act—"against which there remains outstanding tax certificates which on the date this Act becomes a law, are more than two years old" would defeat the declaration of forfeiture in Section 9 and the obvious purposes of said Act where, through negligence, inadvertence or omission the collector failed to make the tax sale for 1933 taxes prior to June 9, 1935; and would leave dead, frozen and depreciated assets outstanding, prevent a sale by the Trustees of the Internal Improvement Fund with resulting revenue and replacing said lands back on the tax rolls as contemplated by said Act.

Mention of tax sale certificates in Section 9 must be considered as referring to and including unpaid taxes and liens held by the State delinquent for more than two years on the date Chapter 18296 became a law—June 9, 1937.

It is, therefore, my opinion that where tax certificates, which were issued after June 9, 1935, for taxes for the year of 1933 or prior years and which were in the hands of the State on June 9, 1939, title to lands covered by said certificates vested in the State under Chapter 18296, Laws of Florida, Acts of 1937, and that said lands are subject to sale by the Trustees of the Internal Improvement Fund.

All opinions in conflict with the above are hereby expressly revoked.

TAX SALE CERTIFICATES AND TAX DEEDS

May 27, 1941.—041-289.

MURPHY ACT—REDEMPTION OF CERTIFICATES

QUESTION: Is it necessary for a person who purchased tax certificates under the Murphy Act for the years 1928 to 1938 inclusive, to re-

TAXATION AND FINANCE—Tax Sale Certificates and Tax Deeds

deem tax certificates held by a private individual for the years 1926, 1927 and 1928 at the time he makes application for a tax deed?

To Hon. R. Clyde Simmons, Clerk Circuit Court, Wauchula, Florida:

I have carefully examined Chapter 18296, Laws of Florida, Acts of 1937, and I do not find where a purchaser of tax certificates thereunder acquired any rights other than any other purchaser of a tax certificate except that he did have the opportunity of buying the tax certificate for a lesser amount than he could in any other manner. Therefore, if he sought to convert his tax certificates into a tax deed, it was necessary for him to proceed under Section 999 (136), Compiled General Laws of 1927, Permanent Supplement. The pertinent part of this Section reads:

"The certificate holder shall pay to the Clerk the proper amount fixed by law for the redemption or purchase of all other outstanding tax certificates covering said lands . . ." (Emphasis supplied.)

It is, therefore, apparent that it is necessary for a certificate holder when he seeks a tax deed, to redeem all outstanding tax certificates.

I therefore answer your question in the affirmative.

TAX SALE CERTIFICATES AND TAX DEEDS

August 7, 1941.—041-134.

MURPHY ACT—REDEMPTION OF CERTIFICATES

QUESTION: Under decisions of the Florida Supreme Court in the case of *Green v. State*, 191 So. 778 and *Groves v. Carruthers*, 193 So. 849, should the clerk refund to the applicant for a tax deed in case such applicant is not the successful bidder for the property, the amount required to redeem the certificate, or should the applicant be entitled to recover only the actual amount he paid for the certificate at the time he purchased it under the Murphy Act, together with interest and other costs and expenses paid by him in order to qualify as an applicant for a tax deed?

To Hon. J. M. Lee, Comptroller:

I have examined both of the cases you refer to and I do not find where the Supreme Court made any reference in the *Carruthers* case to the *Green* case. It is therefore obvious that the Supreme Court saw no conflict between the two cases; otherwise, it would have probably distinguished the two or overruled the *Green* case, and from my study of these two cases, I see no conflict between the two.

The Supreme Court in the *Green* case very specifically set forth the amounts required to be paid in the redemption of tax certificates and settled the law in that regard. That particular question was not before the Supreme Court in the *Carruthers* case. The only question before the Court was what to do with the surplus after the holder of the tax certificate had been paid the amount due him under the law.

It is, therefore, my opinion that as to the amount necessary to redeem land from a tax certificate under similar facts as in the *Green* case, which is the bid of the holder of the tax certificate under the law, that you are to follow the *Green* case in order to determine the amount that the certificate holder is to receive in the event he is not the successful bidder; and that with reference to any surplus that might accrue after the holder of the tax certificate has received the amount due him under the *Green* case, that any surplus is to be disposed of under the *Carruthers* case.

TAXATION AND FINANCE—Tax Sale Certificates and Tax Deeds**TAX SALE CERTIFICATES AND TAX DEEDS**

April 3, 1942.—042-156.

MURPHY ACT—REDEMPTION OF CERTIFICATES

QUESTION: What is the interpretation of recent Supreme Court ruling that in foreclosing Murphy Act certificates the applicant is not entitled to the face of the oldest certificate?

This question involves the case of Boston and Florida Atlantic Coast Land Company, a Maine corporation, and Alice R. Prudden vs. Ricker Alford and Madison Realty Company, a Florida corporation, et al., decided by the Supreme Court of Florida on March 27, 1942.

To Hon. D. H. Sloan, Jr., Clerk Circuit Court, Bartow, Florida:

The opinion in the above case recites the following:

"The record in this case discloses that Ricker Alford on November 7, 1938, pursuant to the terms and provisions of Chapter 18296, Acts of 1937, Laws of Florida, commonly known as the Murphy Act, paid to the Clerk of the Circuit Court of Palm Beach County, Florida, the sum of \$232.57 for tax sale certificate number 5928 of the sale held on July 4, 1927, for the 1926 state and county taxes in the principal sum of \$3,372.82, and for certificate number 20,999 of the sale held on August 7, 1933, for the state and county taxes in the principal sum of \$856.20. The original tax certificates were assigned by the Clerk to Ricker Alford."

Alford filed suit in the Circuit Court in equity to foreclose the state and county tax liens, and sought a decree for the face amount of the certificates, together with interest and court costs. A decree was entered by the Circuit Court for the face amount plus interest on each certificate.

On appeal to the Supreme Court the question presented for adjudication was whether the amount of recovery in the foreclosure proceedings should be limited to the amount paid for the involved certificates by the purchaser under the Murphy Act in the sum of \$232.57 with interest since payment on November 7, 1938, or should the face amount of the certificate, plus interest, be decreed in the total sum of \$4,204.36 as decreed by the lower court.

The Court held that the Plaintiff, Alford, was restricted or limited in the amount recoverable, to the sum of \$232.57, the amount paid by him to the Clerk of the Circuit Court of Palm Beach County, Florida, for the certificates, with legal interest until paid, together with court costs.

My interpretation of this opinion is that the Supreme Court of Florida followed the equitable principle enunciated in the case of Lang vs. Quaker Realty Corporation, 179 So. 144. In that case suit was brought to enforce payment of the face amount of certain tax certificates sold by the City of Miami for considerably less than the face value. In discussing the amount recoverable the Supreme Court of Florida said:

"In such cases absent statutory provisions to the contrary and absent contract creating the lien, the complainant is limited to that which equity will require. In equity and good conscience the complainant is entitled to recover no more than a sum equal to the sum paid for the certificate, with interest thereon from the date of the expenditure." Lang vs. Quaker Realty Corporation, 179 So. 144.

These two cases were decided upon equitable considerations, the Supreme Court holding in each case that under the facts in that case, the plaintiff was not entitled to recover any greater amount than that

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which he had paid for the certificates, together with interest and costs, as "he who seeks equity must do equity," and a Court of Equity would not permit the unconscionable profits sought in these cases.

However, I do not believe that the holding of the Supreme Court in these cases is applicable where a voluntary redemption is made of tax certificates sold under the provisions of the Murphy Act.

The Supreme Court of Florida, in the case of *Green vs. State*, ex rel., Northern Investment Corporation, 191 So. 778, has laid down the rule applicable in such cases as follows:

"The result is that the amounts required to be paid for redemption in this case are (1) the \$40.10 paid for the tax certificates and subsequent or omitted taxes; (2) interest thereon at 3% per annum from the date of the tax certificate to July 16, 1939, two years after the sale under Chapter 18296; (3) the face of the oldest of the three tax certificates; (4) interest thereon at 18% per annum for the first year from July 16, 1939, ten per cent per annum for the second year, eight per cent per annum thereafter, 'but not less than five per cent of the face of the tax certificate'; (5) all clerk's costs and expenses incurred in obtaining the tax certificates."

In the *Boston and Florida Atlantic Coast Land Company* case, *supra*, the court specifically stated that the enunciation in the *Green vs. State* ex rel., Northern Investment Company case, *supra*, does not effect or conflict with the rule established in *Lang vs. Quaker Realty Company*, *supra*.

It is clear, therefore, that the Court did not intend to overrule or modify the rule laid down in *Green vs. State* by its holding in the *Boston and Florida Atlantic Coast Land Company* case.

It is therefore my opinion, that in the case of the voluntary redemption of a tax certificate sold under the provisions of the Murphy Act, the holder of such certificate is entitled to receive (1) the amount paid for the tax certificate and subsequent or omitted taxes; (2) interest thereon at 3% per annum from the date of the tax certificate for two years after the sale; (3) the face of the oldest certificate; (4) interest thereon at 18% per annum for the first year from two years after the date of sale, 10% for the next year, and 8% per annum thereafter, but not less than 5% of the tax certificate; (5) all clerk's costs and expenses incurred in obtaining the certificates.

TAX SALE CERTIFICATES AND TAX DEEDS

August 12, 1942.—042-397.

MURPHY ACT—VESTING OF TITLE

QUESTION: Tax sale certificate No. 585 of the sale of 1933 was issued for the non-payment of 1932 state and county taxes on certain land in Sumter County, Florida, and thereafter the owner of such land paid state and county taxes thereon assessed for the years 1933, 1934, 1935, 1936 and 1937. Did title to this parcel of land vest in the State of Florida under the provisions of the Murphy Act (Chapter 18296, Acts of 1937)?

To Hon. F. C. Elliot, Secretary, Internal Improvement Fund:

Under the facts stated in your letter, this certificate became frozen under the provisions of Chapter 16252, Acts of 1933 as amended by Chapter 17400, Acts of 1935 (Futch Law).

TAXATION AND FINANCE—Tax Sale Certificates and Tax Deeds

Under the Futch Law the owner could have paid the 1938 taxes on the land involved at any time prior to July 1, 1939, and the certificate would have remained frozen for an additional period of 15 years, provided current taxes were paid.

Under the Murphy Act title to all lands covered by the provisions of Section 9 vested in the State of Florida absolutely, without right of redemption, on June 9, 1939, if at all.

It is therefore my opinion that the title to the land embraced in tax certificate No. 585 of the sale of 1933 issued by the Tax Collector of Sumter County, Florida, did not vest in the State of Florida under the provisions of the Murphy Act.

TAX SALE CERTIFICATES AND TAX DEEDS

February 11, 1941.—041-64.

TAX DEED—VALIDITY OF NOTICE

QUESTION: Is a tax deed notice good if it contains more than one description?

To Hon. R. Clyde Simmons, Clerk of Circuit Court, Wauchula, Fla.:

More than one parcel of land may be contained in publication of notice and tax deeds where notice requires only payment of taxes and expenses due on each parcel separately.

Notice of application for tax deed may contain the description of more than one parcel of land owned and claimed by different persons where the notice requires only payment of taxes and expenses due on each parcel separately.

TAX SALE CERTIFICATES AND TAX DEEDS

May 17, 1941.—041-266.

VOID CERTIFICATE—REFUND—BOARD OF ADMINISTRATION

QUESTION: Is the Board of Administration authorized to use applicable interest and sinking funds of Putnam County Court House Road and Bridge bonds amounting to \$14.69, interest and sinking funds of Special Road and Bridge District No. 6 of Putnam County, amounting to \$96.51, and interest and sinking funds of Putnam County Special Road and Bridge District No. 2 in the amount of \$41.96, in payment to the Honorable Thomas B. Dowda, as attorney for Irene Otto Brown, on account of tax certificate No. 420, sale of 1925, in the sum of \$558.00 having been declared invalid by the Circuit Court in and for Putnam County, Florida, in the case of State, ex. rel. Irene Otto Brown v. J. M. Lee, Comptroller.

To Hon. J. Edwin Larson, State Treasurer as County Treasurer Ex Officio:

Chapter 18314, Laws of Florida, Acts of 1937, provides in part as follows:

"Section 1. That when a tax sale certificate is void . . . the holder of such tax sale certificate shall be entitled to the return of the amount received therefor; . . ."

This statute has been sustained by the Supreme Court of Florida, in the case of State, ex rel. Northern Investment Corporation v. Lee, State Comptroller, 183 So. 838. The Supreme Court states as follows:

TAXATION AND FINANCE—Tax Sale Certificates and Tax Deeds

"The holder of a state and county tax sale certificate was entitled to refund of amount received by state for purchase of certificate and payment of subsequent and/or omitted taxes subsequent to purchase of certificate, where tax liens were held void . . ."

"The involved certificates having been duly adjudicated by a court of competent jurisdiction to be null and void, it becomes the duty of the respective officers to make the refunds as required by the provisions of Chapter 18314, Acts of 1937." (Text 841.)

You advise that the Circuit Court of Putnam County has declared the certificate herein involved invalid. If the moneys requested from the Board of Administration were actually received by the Board of Administration, or were received by the Board of Bond Trustees of Putnam County prior to the creation of the Board of Administration, and which moneys were delivered by the Board of Bond Trustees of Putnam County to the Board of Administration upon its creation, then in my opinion the Board of Administration would be authorized to pay to Thomas B. Dowda, as attorney for Irene Otto Brown, et al., of Palatka, Putnam County, Florida, the sum of \$14.69 out of the funds to the credit of Court House Road and Bridge District of Putnam County, Florida, and the sum of \$96.51 out of the funds to the credit of Special Road and Bridge District No. 6 of Putnam County, Florida, and the sum of \$41.96 out of the funds to the credit of Special Road and Bridge District No. 2 of Putnam County, Florida.

TAX SALE CERTIFICATES AND TAX DEEDS

February 13, 1941.—041-68.

VOID CERTIFICATE—REFUND—COMPTROLLER

QUESTION: What are the duties and responsibilities of the comptroller in situations as outlined below:

"No. 1. Certificate was purchased by an individual from the Tax Collector at his annual sale and at the time of the purchase there was already a certificate in the hands of the State for a prior year's delinquency. The Court decreed the individually owned certificate void because the Tax Assessor in this case extended the taxes contrary to the provisions of Section 984, Compiled General Laws, which resulted in the Collector advertising and issuing this certificate in error.

"The Legislature by the enactment of Sections 995 and 996 recognized oversights of this kind would occur and provided for their correction. First, by allowing the privilege of redeeming in installments according to the number of certificates issued, or second, by waiving all costs incident to the issuance of more than one certificate. In neither case was any provision made or intended that the entire tax for that year should be cancelled. On the contrary Sec. 984 specifically requires that the tax be collected, yet when the second certificate was decreed void by the Court the State and County are called upon to refund to the owner of the certificate the amount of taxes which were collected from its purchase and which amounts to the land escaping taxation for that year. There are many cases of this kind, and if the Court was right in decreeing the certificate void for the reason stated, then should not refunds be made in cases where this condition exists without requiring the landowner to incur the expense of having the certificate decreed invalid by the Court?

"No. 2. The taxpayer filed a bill in equity to quiet title to his homestead and made a certain owner of tax certificates against his

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homestead defendant. Service was by publication, despite the fact the certificate owner had legal representatives in Florida and their address was well known to the Clerk of the Circuit Court. The publication was made in a newspaper published in a small town, which was not the County site, with the result that the owner of the certificate had no notice of the institution of the suit and was not in court to defend their validity.

"The taxpayer alleged the certificates were void because they were issued for taxes upon land assessed to the taxpayer, when as a matter of fact the land belonged to his wife and there being no one in Court to take issue, the Court so held. It might be added that despite the allegation as to the ownership of the land, the taxpayer himself filed claim for homestead exemption on the land for the year represented by one of the certificates.

"No. 3. In a suit attacking the validity of a tax certificate it was alleged it was void because the assessment of the land for the year represented by the certificate was in the name of a certain owner, when in fact a different person owned the land that year, the Court decreed the certificate void, although an assessment of this kind is authorized by Sec. 928, Compiled General Laws. An examination of the original decree, however, shows it was by stipulation between the Attorneys for the Complainant and Respondent which indicated a settlement of the amount involved out of Court, the certificate being decreed invalid merely for the purpose of clearing the record.

"It will be noted that in none of these cases where the State and County represented, although they were to be vitally affected by the final decree because of having received most of the proceeds from the sale of the certificates, in fairness and equity they should make refund of the taxes they received from their purchase, if the certificates are worthless.

"The Supreme Court in the case of *State ex rel. Northern Investment Corporation vs. Lee*, 183 So. 838 apparently holds that refunds are to be made in every case in which the certificates have been decreed invalid in the following language:

"The involved certificates having been duly adjudicated by a court of competent jurisdiction to be null and void, it becomes the duty of the respective officers to make the refunds as required by the provisions of Chapter 18314, Acts of 1937."

"To follow this ruling literally will result in depriving the State and County of revenues to which they are entitled and to not follow it results in the State breaking faith with a purchaser of a tax certificate by not making restitution when the lien he purchased is decreed void in cases of this kind."

To Hon. J. M. Lee, Comptroller:

I have carefully considered the case that you cite of *State ex rel. Northern Investment Corporation vs. yourself*, 183 So. 838, and apparently, under this decision, the Supreme Court has held that whenever certificates have been "duly adjudicated by a court of competent jurisdiction to be null and void, it becomes the duty of the respective officers to make the refunds as required by the provisions of Chapter 18314, Acts of 1937."

In that case, the Supreme Court further said:

"But in the instant case the alternative writ of mandamus alleges and shows that the certificates have been held invalid and void because

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of insufficiency of description, by a court of competent jurisdiction and the Clerk's certificate is shown to be on that judicial determination of invalidity."

It seems to me that all of the items you have mentioned under one, two and three are covered by the ruling of the Court in this case and that it would be your duty to make refunds as provided by law whenever it involved certificates that have been

"duly adjudicated by a court of competent jurisdiction to be null and void,"

and I can see no escape from this decision of our Court regardless of its effect upon the revenues of the State and County.

It would seem that as a practical matter, since the Clerk of the Circuit Court has possession of tax certificates and since any suit involving any of the certificates in his possession would be filed in his Court, it would be possible for him to notify the Board of County Commissioners of the institution of any suit affecting such tax certificates so that the County could be represented whenever it was deemed of sufficient importance. Since the County receives the greater portion of the proceeds from State and County ad valorem taxes, the County should be primarily concerned but could, of course, notify you whenever the Board felt that the amount in controversy would warrant doing so.

An Act of the Legislature that would require your Office to be notified whenever any suit is filed that directly or indirectly involves a State tax might be helpful not only in situations of this kind but in others that I know you must be constantly facing. I offer this thought for your consideration.

TAX SALE CERTIFICATES AND TAX DEEDS

June 3, 1941.—041-306.

VOID CERTIFICATE—REFUND—COMPTROLLER

QUESTION: Under Section 1009, Compiled General Laws, the Comptroller and Clerk of the Court are authorized to refund the amount of taxes paid for tax certificates which are later found to be void or invalid, but it further contains the provision that such refunds are not in order for certificates issued prior to January 1, 1913.

A request has been made for refund on tax certificates issued in 1894 and 1901 on lands which at that time, belonged and still belong, to the Federal Government. However, these certificates were not sold by the Clerk of the Court until 1925 and tax deed was issued thereon. Under these circumstances, does the State Comptroller and the Clerk of the Court have authority to make the refund in question?

To Hon. J. M. Lee, Comptroller:

I have examined Section 1009 above referred to by you, and I find this Section as originally enacted is as you have set forth except that its provision with relation to certificate issued prior to January 1st is somewhat different. I quote the same:

"Provided that this section shall not be so construed as to apply to any tax certificate issued by a tax collector prior to January 1, 1913."

I think the first question to be determined is whether or not a certificate has been issued that is owned by the State of Florida and held

TAXATION AND FINANCE—Tax Sale Certificates and Tax Deeds

by the clerk of the circuit court after the tax collector has offered the same for sale and has received no bids for such certificate from private individuals, and has, under the statute, delivered the same to the clerk of the circuit court for sale or redemption. As you know, the tax collector makes a sale of all lands upon which taxes are delinquent and thereafter issues a tax certificate to the purchaser, or in the event of no purchaser, to the State of Florida, and delivers the same to the clerk of the circuit court. In this connection, Section 983, Compiled General Laws, provides:

"All tax sale certificates now owned by or hereafter issued to the State, shall be held by the clerks of the circuit courts of the several counties . . ."

It is obvious that the certificate has been issued and has passed out of the hands of the tax collector even though it is owned by the State of Florida. Therefore, the tax certificates that you mention were actually issued in 1894 and 1901 and Section 1009, C. G. L., would, therefore, not apply and you would have no authority for refunding any money under this statute.

I might also call your attention to the fact that the Supreme Court of Florida in the case of *Otto vs. Harlee*, 161 So. 402, held that portion of the statute that conferred authority upon the clerk of the court to determine whether or not a tax certificate was void, to be in conflict with Section 1 of Article V of our Constitution. This same statute was practically re-enacted by Chapter 18314, Acts of 1937, and Section 1009 (4) evidently was inserted in this same chapter in order to cure the part of the old statute that had been held unconstitutional because it provided for a judicial determination of the question of whether or not the certificate was void. However, this Act was limited to tax sale certificates issued prior to January 1, 1913.

On January 8, 1937, the Supreme Court had before it the case of *Palbicke v. Lee*, State Comptroller, 172 So. 481. In that case the Supreme Court said this with regard to Section 1009, C. G. L.:

"The complainant based his right to refund upon the provisions of section 783, R.G.S., section 1009, C.G.L. In construing this section of the statutes in the case of *Otto v. Harlee et al.*, 119 Fla. 266, 161 So. 402, 404, we held the pertinent provisions thereof to be unconstitutional . . ."

The Supreme Court then held:

"There is no other statute except that above referred to which purports to authorize the comptroller to refund public money in cases of this kind. It is well settled that a public official charged with the custody and control of public funds may only pay out the same in the manner provided by statute where the statute directs the manner and method of such payment. See *Thomas v. Carlton*, 106 Fla. 648, 143 So. 780. If we should hold in accordance with appellant's contention we would in effect hold that, absent any legislative authority, one may procure a declaratory judgment in equity and pursuant thereto coerce the comptroller to refund moneys which have theretofore been paid in by him to the state treasury pursuant to law. This is the exercise of a legislative and not a judicial power.

"Section 116, R.G.S., section 146, C.G.L., provides in part:

"And no warrant shall ever be issued until the same has been authorized by act or resolution of the Legislature."

"It, therefore, follows that as there is no valid statute requiring the comptroller to draw his warrant for the amount of the refund claimed, the relief sought is not available."

TAXATION AND FINANCE—Tax Sale Certificates and Tax Deeds

In a dissenting opinion by Judge Davis, it is pointed out that the holding of the Court in the case of *Otto vs. Harlee*, supra, was

“limited in its effect to a holding that it was unconstitutional only in so far as it contemplated the exercise of judicial power by the clerk of the circuit court to pass upon legal questions as to the validity of tax certificates vel non.”

In the case of *State vs. Lee*, 183 So. 838, the Court reiterated what it said in the case of *Otto vs. Harlee* but granted the relief in that case because they said:

“But in the instant case the alternative writ of mandamus alleges and shows that the certificates have been held invalid and void because of insufficiency of description, by a court of competent jurisdiction and the Clerk's certificate is shown to be on that judicial determination of invalidity.”

This case, of course, arose after Chapter 18314, Acts of 1937, had been passed which authorized judicial proceedings, and subsequently in this same case the Court followed its earlier decision in 187 So. 368.

For the reason given above, I am, therefore, of the opinion that neither you nor the clerk of the court have authority to make the refund in question.

TAXES ON RAILROADS

September 19, 1941.—041-539.

RAILROAD ASSESSMENT BOARD—POWER TO DETERMINE ASSESSMENT VALUES

QUESTION: (1) What is the power of the Railroad Assessment Board in determining the distribution of railroad and telegraph assessment values among the municipalities of the State?

(2) What is the power of the Railroad Assessment Board in determining the distribution of railroad and telegraph assessment values among the counties of the state, and upon what basis is the assessment divided with respect to the counties?

To Hon. J. Edwin Larson, State Treasurer:

(1) The Railroad Assessment Board has no duty to perform with reference to the matter of determining the distribution of railroad and telegraph assessment values among the municipalities, nor does the Board have any duty to perform with reference to the matter of determining the distribution of railroad and telegraph assessment values upon said companies' personalty. See *Atlantic Coast Line Railroad vs. Amos*, 115 So., text page 320.

(2) With reference to the matter of determining the distribution of railroad and telegraph assessment values upon the real property of the companies among the counties of the State and upon what basis this is divided with respect to the counties, I am of the opinion that after the Railroad Assessment Board has assessed all of the real property of said companies as an entirety, that then the Board should distribute the total valuation among the several counties according to the mileage in each of the respective counties of the State. *A.C.L. vs. Amos*, 115 So., Text page 320; also *Cooley on Taxation*, 4th Edition, Section 454-490; *Elliott on Railroads* (2nd Edition) Paragraph 737.

TAXATION AND FINANCE—Court Proceedings Relating to Taxation
COURT PROCEEDINGS RELATING TO TAXATION

April 25, 1941.—041-229.

COUNTY ATTORNEYS—CITY TAX FORECLOSURE PROCEEDINGS

QUESTION: The Hillsborough Board of County Commissioners has appointed a regular County Attorney and two Assistants to handle its general legal affairs, and has also appointed Mr. J. Tom Landrum to handle the collection of delinquent real estate taxes. Can Mr. Landrum, as such special attorney, be authorized by the Board to represent the State in suits where delinquent State and county taxes cover the same property?

To Hon. James S. Moody, Assistant County Attorney, Tampa, Florida:

Section 3 of Chapter 18315, Acts of 1937, relating to the State as a party in suits brought by certain governmental agencies to foreclose tax or assessment liens, when the State also has a tax lien on the same property, provides:

"In such suits it shall be the duty of the Attorney of Record for the County to represent the interest of the State and county; and the city, village or town and the county, whether party plaintiff or defendant, shall be entitled to recover reasonable fees for the services of their respective attorneys therein, as allowed and apportioned by the Court, which shall be a lien against the property involved, and payable from the proceeds of the sale thereof."

The question, of course, resolves itself into whether "Attorney of Record for the county" refers only to the County Attorney, or may refer also to special attorneys in charge of certain litigation.

I have read a number of Florida cases that seem to have some bearing on the question, and I have come to the conclusion that the Florida Supreme Court would be likely to rule that those words may embrace a special attorney as well as the county attorney. The case you mention in your letter, *State ex rel Himes vs. Culbreath*, 128 Fla. 210, 174 So. 422, evinces liberality on the part of the Court in construing the powers of the County Commission in the matter of employing counsel, specifically holding that the Act providing for the position of County Attorney was not a limitation upon, but an extension of the general powers of boards of county commissioners in the matter of representing the counties in a prosecution and defense of all legal causes.

Another case closer to the present case in some of its facts is *Godard vs. Campbell*, 143 Fla. 419, 196 So. 814, involving a special attorney hired by a City Commission to collect delinquent taxes. The Court upheld the appointment of such special attorney and indicated that a special attorney could properly be appointed, except in cases where a statute might in meticulous detail name and designate the powers and duties of a particular officer.

As I read Section 3 of the Act above quoted, I cannot find that the Legislature has clearly declared that the County Attorney is the "Attorney of Record for the County" referred to. For this reason I am inclined to the view that a special attorney appointed by the Board of County Commissioners to handle tax foreclosure suits, may properly represent the interest of the State under Section 3 of the Act.

However, you will understand that I am not passing on the validity of any contract that may have been entered into between the Board of County Commissioners and such Special Attorney. I call your attention

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in this regard to the opinions of the Supreme Court in *Williams, et al. vs. Watson*, 103 Fla. 45, 137 So. 10, and upon rehearing in 103 Fla. 45, 138 So. 83. This case involved Chapter 14572, Acts of 1929 (Extra Session), and held on rehearing:

"The opinion and judgment of the court does not preclude the county commissioners from entering into a contract with an attorney to foreclose liens of tax certificates or tax deeds. The opinion and judgment does hold that the contract entered into by the county commissioners with the attorney went beyond the scope of the authority of the county commissioners in its terms and conditions, and attempted to place unauthorized burdens on delinquent taxpayers, or upon the fund to be derived from the foreclosure of the tax liens involved.

"The statute as therein construed authorizes the county commissioners to enter into a contract with an attorney to foreclose a specific tax lien or certain specific tax liens as evidenced by tax certificates or a tax deed, but does not authorize the board of county commissioners to enter into a blanket contract for a period of two years which would contemplate the withdrawal of all tax certificates from the Clerk's office and place them into the hands of an attorney for foreclosure, thereby burdening each and every tax certificate or lien to the extent of the attorney's fees contemplated by the contract."

INTANGIBLE PERSONAL PROPERTY TAXATION

March 1, 1941.—041-94.

ALIENS—SUBJECT TO INTANGIBLE TAX

QUESTION: Inasmuch as alien residents of the State of Florida have the benefits of the homestead exemption, would not such alien residents be subject to the intangible personal property tax?

To Hon. Charles A. Wilcox, Tax Assessor, Pinellas County, Clearwater, Florida:

It seems that it would be only fair and right to assess intangible tax against an alien who has claimed the benefit of the homestead exemption for the reason the basis of a homestead exemption claim can only be because such person intends to make this State his or her permanent home, and, therefore, in accepting the benefits of our laws, such person would also be charged with any burdens occasioned thereby. In the past this office has had occasion to quote from the case of *Catlin v. Hull*, 21 Vt. 152, where the Court said:

"We think it entirely just and equitable that, if persons residing abroad bring their property and invest it in this state for the purpose of deriving profit from its use and employment here, and thus avail themselves of the benefits and advantages of our laws for the protection of their property, their property should yield its due proportion towards the support of the government which thus protects it."

INTANGIBLE PERSONAL PROPERTY TAXATION

April 2, 1942.—042-150.

ANCILLARY ADMINISTRATOR—DUTY TO FILE RETURN

QUESTION: Where a non-resident dies, leaving property within this state, and an ancillary administrator is appointed in this state, and certain moneys come into his possession as such representative:

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(1) Is it incumbent upon such representative to file a return under Section 9, Chapter 20724, Acts of 1941?

(2) Is the Tax Assessor required to assess property under the above act?

To Hon. A. C. Courson, Tax Assessor, Martin County, Stuart, Florida:

(1) Section 9 of Chapter 20724, specifically answers your question with regard to representatives of estates. I quote it in part:

"It is hereby made the duty of every person, firm or corporation owning or having control, management or custody of intangible personal property in this State, which is subject to taxation under the laws of Florida, including trustees, executors and administrators . . ."

(2) Sections 6, 7, 11 and 12 make it your duty to assess property returned under the above Act. Same, of course, to be assessed in accordance with said Section.

INTANGIBLE PERSONAL PROPERTY TAXATION

May 5, 1942.—042-219.

ANCILLARY ADMINISTRATOR—DUTY TO FILE RETURN

QUESTION: Must an ancillary administrator file intangible tax return if intangibles have acquired a business situs in the State of Florida?

To Hon. A. C. Courson, Tax Assessor, Martin County, Stuart, Florida:

(Supplement to opinion dated April 2, 1942, 042-150.)

In my opinion of April 2, 042-150, I merely quoted the statute and did not undertake to point out under what conditions intangible personal property was subject to taxation because this is a question of fact. The general rule laid down by Cooley on Taxation, 3d Edition, page 87, is also a general statement of the law and did not purport to give the exceptions to the rule.

Intangible property belonging to a non-resident is subject to taxation in the State of Florida if it has acquired a business situs, and as to what is a business situs must depend on the facts of each case. See *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 80 L. Ed. 1143; see annotation 76 A.L.R. 806.

INTANGIBLE PERSONAL PROPERTY TAXATION

June 5, 1941.—041-311.

DEEDS—EXEMPT FROM LIENS

QUESTION: Are deeds given by the Trustees of the Internal Improvement Fund free and clear of any former intangible tax liens held by the State of Florida?

To Hon. Chas. G. Strohmeier, Tax Collector, Sarasota County, Sarasota, Florida:

Since title to lands under the Murphy Act vested in the State of Florida in fee simple and the Trustees of the Internal Improvement Fund were merely the agents of the State of Florida in handling such land, I am of the opinion that any lien held by the State of Florida merged into the fee simple title when same vested in the State of Florida,

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and that a deed given by the Trustees of the Internal Improvement Fund would be free and clear of any former intangible tax lien held by the State of Florida.

However, this would not relieve the person who owed the intangible taxes to the State of Florida from the obligation to pay the same nor would it relieve any other property owned by this person from the lien of such tax.

INTANGIBLE PERSONAL PROPERTY TAXATION

June 5, 1941.—041-312.

FORECLOSURE SUIT—EFFECT ON INTANGIBLE TAX LIEN

QUESTION: At what time in foreclosure suit does previous owner go out of title of Intangible unpaid tax liens? Is it at Final Decree, Order Confirming, or Master's Deed?

To Hon. Chas. G. Strohmeyer, Tax Collector, Sarasota County, Sarasota, Florida:

I assume that you mean a foreclosure by a private individual. Such foreclosure would not affect any intangible tax lien held by the State of Florida. It, therefore, would be immaterial at what time title passed to the purchaser of such land at the foreclosure sale since he would take the land subject to the unpaid intangible tax lien.

INTANGIBLE PERSONAL PROPERTY TAXATION

September 14, 1942.—042-449.

INSURANCE—TAX ON ENDOWMENT AND ANNUITY POLICIES

QUESTION: The late Honorable Cary D. Landis, former Attorney General, under date of January 5, 1934, held that the cash surrender value of a life insurance policy was subject to taxation under the Intangible Personal Property Taxation Act of 1931.

Under date of May 9, 1940, the Honorable George Couper Gibbs, successor Attorney General, modified the opinion previously rendered by Mr. Landis, and held that the cash surrender value of a life insurance policy was not subject to the aforesaid tax.

Are such policies as Annual Premium Retirement Endowments, Retirement Annuities, and ordinary Endowments taxable under the Intangible Act?

To Hon. J. Edwin Larson, Insurance Commissioner:

The Legislature of 1941 enacted what is known as the Intangible Taxation Act of 1941, repealing the Act of 1931, and I, therefore, assume your request has reference to the existing Intangible Personal Property Taxation Act, and I shall treat it accordingly.

For answer to your first question as to whether or not the cash surrender value of a life insurance policy is subject to taxation under the Intangible Personal Property Taxation Act of 1941, it is my opinion that such a policy is not subject to the tax, and I, therefore, concur in the conclusions reached by my predecessor in his opinion of May 9, 1940. My reason for holding that the cash surrender value of a life insurance policy is not subject to the tax is that such a policy does not come within any one of the four classes of intangible property as set forth in the

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Act. The cash surrender value of a life insurance policy is not a direct obligation to pay money as the cash surrender value is merely incidental and, if exercised, all other rights under the policy are surrendered. A life insurance policy is not taken out for its surrender value. It is a policy to afford protection for one's family and his creditors.

A person would not take out a life insurance policy on the basis of its cash surrender value. The longer a life insurance policy continues in force the greater the value, but only on death does it pay the full amount. A life insurance policy cannot be treated and is not recognized as any commercial paper, and is such a contract that is payable on the death of the insured.

I have been unable to find a legal definition of the three types of insurance you mention, but from the authorities I have read I have concluded that different insurance companies, for business reasons, have given different names to Endowment and Annuity insurance policies.

An Endowment insurance is, in general, a contract to pay the assured, in consideration of a premium or premiums to be paid within a certain limited time, a specified sum of money at the termination of a certain designated period, if he is then living, but to a person named if assured dies before the specified time.

An Endowment policy does not, in my opinion, come within any one of the four classes of intangible personal property as set forth in Section 199.02, Florida Statutes 1941. Certainly this type of policy cannot be classed as money, United States legal tender notes, bank deposits of all kinds, certificates of deposits, cashier's and certified checks, bill of exchange, drafts, or money placed with savings, building and loan associations as is set forth in Class A, Section 199.02, Florida Statutes 1941.

Class B intangible personal property is defined as being all stocks, shares of incorporated or unincorporated companies; all bonds except of the several municipalities and counties of the State of Florida; all bonds exempt from taxation under the Constitution of the United States or of the State of Florida, bonds and other obligations bearing date prior to January 1, 1942, for payment of money which are secured by mortgage, deed of trust, or other liens upon real or personal estates situated in Florida; the beneficial interest of residents of Florida in trust estates of all kinds when the trustee resides outside of the State of Florida, or if the trustee is a corporation and has its principal place of business outside of the State of Florida, provided that if the trustee returns to the tax assessor such beneficial interest and pays the tax thereon to the tax collector, then the beneficial owner shall not be required to pay the tax thereon.

Class C intangible personal property is defined as being all notes, bonds, and other obligations bearing date subsequent to December 31, 1941, for payment of money secured by mortgage, deed of trust, or other liens upon real estate in Florida, provided that only that part of the value of the mortgage, deed of trust, or other lien, the real property of which is located within the State shall bear to the whole value of the real property described in said obligation shall be included.

Class D intangible personal property shall include all other intangible personal property not embraced in Classes A, B, or C.

An Endowment policy is usually one that pays at some designated future time if the insured is then living. If not, then to a person or institution.

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An Annuity is generally understood as an agreement to pay a specified sum to the annuitant annually during life, or in fixed installments at stated intervals over a definite period.

Basing my opinion on the facts I have before me, and assuming the three types of insurance you classify as Annual Premium Retirement Endowments, Retiring Annuities, and Ordinary Endowments will come within the classification of either an Endowment or an Annuity, it is my opinion that an Annuity Insurance Policy is subject to the provisions of the Intangible Personal Taxation law under Class D provided the contract is in force and effect and it has a stated and calculated value, but an Endowment policy is not subject to the tax as such policy in my opinion does not come within either Class A, B, C, or D. See Section 199.02, Florida Statutes 1941.

Of course, when and if the Endowment policy matures as an endowment in favor of the insured, then the proceeds thereof would be subject to the Intangible Personal Property tax, with the classification depending upon the disposition made with reference to the endowment at the time of its maturity.

INTANGIBLE PERSONAL PROPERTY TAXATION

August 6, 1941.—041-432.

INTANGIBLE TAXES—DEFINED

QUESTION: Is the tax imposed by Chapter 20724, Laws of Florida, 1941, on those intangibles defined and classified in Section 3 (3) of said Act an ad valorem tax, or is it in truth and in fact a tax upon the privilege of recording the instrument?

To Hon. J. Edwin Larson, State Treasurer:

The tax is an ad valorem tax. I can arrive at no other conclusion when I read the Act in its entirety, especially in view of the provisions contained in Sections 6, 7, 9, and 13 thereof. The tax is levied and assessed according to the value (the taxable value being determined by the amount of the indebtedness evidenced by the obligation); the tax is *due and payable at the time the mortgage or other instrument is executed*. The provision that no mortgage shall be admissible to record or recorded in any public record of this State or be enforceable in any court of this State until the tax has been paid does not change the nature of the tax, but this provision simply provides a very efficient method and means for the enforcement and collection of the tax.

INTANGIBLE PERSONAL PROPERTY TAXATION

May 13, 1942.—042-229.

INTANGIBLE TAXES—DISPOSITION BY STATE TREASURER

QUESTION: Various county tax collectors in Florida are still collecting intangible taxes which were assessed prior to the enactment of Chapter 20724, Acts of 1941. Should such prior assessments when received by the State Treasurer be credited to the General Revenue Fund as provided in the laws under which said assessments were made, or should they be deposited in the Intangible Tax Fund with moneys assessed and collected under Chapter 20724?

TAXATION AND FINANCE—Intangible Personal Property Taxation

To Hon. J. Edwin Larson, State Treasurer:

Intangible taxes which were assessed prior to the enactment of Chapter 20724, Acts of 1941, and received by you, should be credited to the General Revenue Fund.

In passing upon the question submitted I have only taken into consideration the disposition of intangible taxes collected and turned over to you which were assessed prior to the enactment of Chapter 20724, Acts of 1941.

INTANGIBLE PERSONAL PROPERTY TAXATION

March 3, 1941.—041-105.

**LEASE AGREEMENTS—CONTAINING OPTION TO PURCHASE;
TAXABILITY**

QUESTION: Is an instrument executed by Mildol Holding Corporation and Guy I. Willard a lease or an agreement for deed, and is it taxable under Class B or Class C of Section 3 of the Intangible Personal Property Taxation Act of 1931?

To Hon. J. M. Lee, Comptroller:

The instrument in substance provides that the lessor leases certain described property for a term of twelve years; the lessee paying \$25.00 in cash as security on the lease, said amount to be applied on the last month of the term of the lease, and the further sum of \$3,000 payable in monthly installments of not less than \$25.00. Upon default, the lessee becomes a tenant at sufferance. The lease also contains a provision that if the lessee has performed all of the terms of the lease, he is then to have the option to purchase the property for the sum of \$3,025.00, plus interest at six per cent and all monthly payments to be credited upon said amount; further, that the agreement is a lease containing an option to purchase and is to be construed only as such.

After careful consideration of the matter, I am of the opinion that the agreement mentioned is not an agreement for a deed but is a lease. The Supreme Court in the case of *Foxworth v. Maddox*, 137 So. 161, said:

"Option to purchase contained in lease, *prior to its exercise*, does not prevent existence of landlord and tenant relation, though rent payments are to be credited on purchase price if option is exercised."

Authorities from other States could be cited, but in view of the direct holding by our Supreme Court on this question, I do not think it would serve any useful purpose.

This brings me to the only other remaining question i. e., whether said agreement is to be taxed under Class B or Class C of Section 3 of the Intangible Personal Property Taxation Act of 1931.

I find that the Comptroller issued a pamphlet on January 5, 1934, containing the Intangible Personal Property Taxation Act of 1931, together with certain excerpts from the opinions of the Attorney General of Florida. On page 26 of this publication, under Section 74, I find that a previous Attorney General held that leases are "among the matters that will be taxed under Class B." I am informed that this pamphlet has received wide circulation. We also know that since this interpretation was placed upon the Intangible Personal Property Taxation Act, several Sessions of the Legislature have intervened and this Intangible Taxation Act has not been changed so as to avoid the effect of the con-

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struction that was placed upon the same as above pointed out. I, therefore, attach great weight to said ruling.

However, I have also examined the Act and find that in the statutory definition of classes covered by Class B, leases are specifically mentioned. I, therefore, concur in the previous opinion above referred to and adopt the same, and hold that the instrument mentioned is taxable under Class B of said Act.

INTANGIBLE PERSONAL PROPERTY TAXATION

February 10, 1941.—041-57.

LEGAL RESIDENCE—DOMICILE OF WIFE

QUESTION: Can a wife maintain her legal status in one state and the husband in another?

To Hon. Jim Burden, Tax Assessor, Orlando, Fla.:

The Intangible Taxation Act stipulates levy of taxes on intangibles of residents of the State, whether their property is physically within the State or not. Acts of 1931 Extraordinary Session, Chapter 15789; *Starkey v. Carson*, 138 Fla. 311, 189 So. 389.

The instant question then devolves upon the legal residence of the married woman. The term "residence" used in relation to taxation, means legal residence, as does also the term "Resident." *Heron v. Passailaigue*, 92 Fla. 818, 110 So. 539.

Generally the domicile of the wife is that of the husband, and is ordinarily not affected by the fact that the wife is living apart from the husband in the absence of a judicial decree of separation or divorce. *Bowmall v. Bowmall*, 127 Fla. 747, 174 So. 14.

Following out the theory of an identity of persons, the law fixes the domicile of the wife by that of the husband, and denies to her during cohabitation the power of acquiring a domicile of her own separate and apart from him. 19 Corpus Juris 414, Sec. 33.

In *Anderson v. Watt*, 138 U. S. 694, the Supreme Court of the United States said that where a wife lives apart from her husband without sufficient cause, his domicile is, in law, her domicile.

My conclusion is that a married woman whose husband is a legal resident of the State of Florida, is likewise a resident of this State, and would be liable for the Florida tax on intangible property owned by her, whether such property is physically within this State or not, subject, of course, to the general exception that a married woman may establish separate residence and domicile for the purpose of divorce.

INTANGIBLE PERSONAL PROPERTY TAXATION

May 20, 1941.—041-275.

LIEN—ENFORCEMENT AGAINST MARRIED WOMAN

QUESTION: Would an assessment for intangible taxes against a married woman in any way encumber real estate owned by her husband? In other words, would a lien for taxes under circumstances mentioned above be enforceable against the husband's property?

TAXATION AND FINANCE—Intangible Personal Property Taxation

To Hon. J. M. Lee Comptroller:

I know of no way to enforce a lien for intangible taxes against a married woman upon the property of her husband.

INTANGIBLE PERSONAL PROPERTY TAXATION

April 26, 1941.—041-224.

**MORTGAGE—RECORD OWNER TAXABLE NOTWITHSTANDING
SUBSEQUENT TRANSFER**

QUESTION: Covington Company receives applications for mortgages to be insured by F. H. A. If the mortgage is accepted, the applicant is so informed and whenever the time comes for the execution of a mortgage, the same is made direct to Covington Company and thereafter all payments upon this mortgage are made to Covington Company. Subsequently, Covington Company assigns this mortgage to the Federal National Mortgage Association, which is a corporation incorporated under an Act of Congress. See 12 U.S.C.A., Paragraph 716 et seq. The notes et cetera of this Corporation are by Federal Law exempt from taxation. Paragraph 1722, Supra. However, Covington Company is the absolute owner of the mortgage up until the very moment it is transferred to some mortgage association doing business under the Federal Law. Covington Company collects interest upon this mortgage from the date of same to the date this mortgage is transferred to said mortgage association. Is Covington Company liable for intangible tax upon all mortgages, the record title of which was in Covington Company on January 1st even though subsequently the mortgage was transferred to a corporation organized under a Federal Law, that provides that the notes et cetera of such company shall be exempt from taxation?

To Hon. J. M. Lee, Comptroller:

I have very carefully considered the memorandum prepared by Mr. J. W. Pettyjohn who represents Covington Company. The substance of Mr. Pettyjohn's memorandum is to the effect that Covington Company operates merely as a transfer agent of the Company organized under the Federal Act that is to purchase the same from Covington Company.

I am unable to follow this line of reasoning because it seems to me it is inconsistent with the theory of being merely a transfer agent where such so-called transfer agent in effect sells the mortgage to the so-called purchaser, and retains all interest that has accrued upon said mortgage up until the date of its actual transfer to the so-called principal. I think Covington Company would be more properly termed a "broker" from the actual facts as I know them. I do not believe that the fact that the note and mortgage may be or is ultimately transferred to a corporation who claims that its notes et cetera are exempt from taxation, affects the situation in the least.

I am, therefore, of the opinion that the Honorable Newton Lummus, Jr., Tax Assessor of Dade County, was correct in making an assessment against Covington Company upon all mortgages that on January 1st were outstanding of record in the name of this Company. I therefore answer your question in the affirmative.

INTANGIBLE PERSONAL PROPERTY TAXATION

August 27, 1942.—042-419.

MORTGAGE EXTENSION AGREEMENT—TAXABILITY

QUESTION: Under the provisions of Chapter 20724, Acts of 1941, would a mortgage extension agreement bearing date the 18th of June,

TAXATION AND FINANCE—Intangible Personal Property Taxation

1942 . . . (stating that whereas the mortgagors being indebted to the mortgagee in the sum of \$7,500 evidenced by promissory note dated May 11, 1937) . . . extending the time of the payment of said mortgage to May 11, 1945, be subject to the intangible tax class C as provided by Sub-section 3 of Section 3 of said act, and provisions of Sub-section C of Section 13 of said act?

To Hon. George J. Dykes, Clerk Circuit Court, Lake County, Tavares, Florida:

In reply wish to advise that under the specific provisions of Sub-section C of Section 3 of said Act the note, which was secured by the mortgage and which has been extended by the instrument you refer to, would only be taxable provided it was dated subsequent to December 31, 1941. Therefore, since the note was dated prior to December 31, 1941, the extension agreement would not be taxable and Sub-section C of Section 13 would not be applicable. However, this does not mean that the note in question would not be taxable under another classification in said Act.

INTANGIBLE PERSONAL PROPERTY TAXATION

January 30, 1942.—042-51.

MOTOR VEHICLES—AD VALOREM TAXES; IMPOSITION

QUESTION: Can the Legislature include automobiles held in stock by dealers for sale in a general inventory tax on stock or merchandise?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner, Tallahassee, Florida:

In the decision of our Supreme Court in the case of Nolan-Peeler Motors, Inc. v. Wood, decided June 30, 1937, and reported in 175 So. 523, our Supreme Court holds that Section 13, Article IX, of our State Constitution, authorizes only one form of taxation on motor vehicles, namely, a license tax, and that any attempt by the Legislature to impose an ad valorem tax on such motor vehicles would be invalid.

INTANGIBLE PERSONAL PROPERTY TAXATION

August 11, 1942.—042-394.

PERSONAL PROPERTY—ACQUISITION SUBSEQUENT TO ASSESSMENT—SEIZURE AND SALE

QUESTION: If a certain kind of personal property is assessed on the tax roll, is it necessary to levy on the property assessed to force collection, or can you levy on another kind of personal property that was not taxable for that year? In other words if you are assessed with cattle on the 1941 tax roll, and in 1942 you open a store of some kind, can I levy on your store for the taxes on those cattle assessed in 1941, although your store was not taxable for 1941 taxes?

To Hon. Grady Potter, Tax Collector, Sumter County, Bushnell, Florida:

Under a recent constitutional amendment the State has no interest in any of the tax revenues derived from ad valorem taxes on personal property. However, in order to keep the enforcement of our taxing laws uniform throughout the State I thought it well to answer your inquiry.

I find that as early as September 3, 1936, this question was considered by this office. I quote from the opinion:

TAXATION AND FINANCE—Intangible Personal Property Taxation

"I respectfully refer you to my opinion under date of March 28, 1935, rendered to you. In that opinion I expressed the view that in collecting personal property taxes which were levied and assessed against the taxpayer because of the ownership of tangible personal property, the county tax collector is authorized to seize and sell all personal property, both tangible and intangible, belonging to the taxpayer, within the county where the levy and assessment were made. I am of the view that this personal property, subject to seizure and sale, includes property acquired subsequent to the date of the assessment, but prior to the levy and sale."

I have carefully considered the same and I find no reason to differ therefrom. I therefore concur in this opinion and hold that your question should be answered in the affirmative.

INTANGIBLE PERSONAL PROPERTY TAXATION

March 27, 1941.—041-168.

TRUSTS—TAXABILITY

QUESTION: In the light of the opinion of the Florida Supreme Court in *State v. Beardsley*, 82 So. 795, what is the liability of a trust for taxes where one or more of the trustees is a non-resident of Florida?

To Hon. J. M. Lee, Comptroller:

I have reviewed the above mentioned decision and I am of the opinion that there has been a mis-construction of this case by Senator Loftin's Office. Apparently, that office is of the opinion that the Supreme Court held "that the trustees could only be taxed for one-third of the value of the personal property in this State." I find that the Supreme Court held this:

"It is essential to the power of taxation that either the owner of personal property be a resident or the property be situated within the district attempting to exercise the power to tax. It is shown by the bill that the appellees are nonresidents of St. Johns county, and it is clearly shown by the evidence that the property is not only presumptively, but actually, in another State; . . ." (Emphasis ours.)

In view of this statement by the Supreme Court, I do not feel that this case is in point and believe that the opinion of December 5th, 1940, of the then Attorney General to be correct and I confirm the same.

EXCISE TAXES

June 20, 1942.—042-309.

DOCUMENTARY STAMP TAX—BILLS OF SALE

QUESTION: Under the laws of Florida are documentary stamps required on bills of sale?

To Hon. Roy R. Raulerson, Clerk of Circuit Court, Okeechobee, Florida:

The law does not require documentary stamps to be placed on bills of sale unless such bills of sale contain a written obligation for the payment of money.

TAXATION AND FINANCE—Excise Taxes**EXCISE TAXES**

December 5, 1941.—041-677.

DOCUMENTARY STAMP TAX—COLLATERAL AGREEMENT FORMS

QUESTION: Are forms used by banks for demand loans subject to the provisions of Chapter 15787, Acts of 1931, known as the Florida Documentary Stamp Act?

To Hon. J. M. Lee, Comptroller:

Under paragraph 3 of the collateral agreement the person signing same agrees to pay any indebtedness to the bank and in the event he fails to do so the bank can proceed to sell the securities held by it, and the person signing such agreement agrees to be responsible for any deficiency remaining unpaid after the securities have been sold, together with

“court costs and reasonable attorney fees for the enforcement and collection of such deficiency.”

It is, therefore, obvious that the person signing said agreement and the other papers that he signs upon securing money from the bank, is under an obligation to repay the same out of the collateral deposited and if this isn't sufficient he is liable for any balance remaining due after the proceeds of the sale of the collateral has been made. Undoubtedly, if any question should arise between the bank and the person signing the agreement submitted, the bank would contend that the forms you submitted constituted either a note or a written obligation to pay money.

I, therefore, overrule the opinion of the Attorney General of June 4, 1934, and hold that whenever the forms submitted, or similar forms, have been properly executed and delivered to any bank that the same are subject to the provisions of Chapter 15787, Acts of 1931, known as Florida Documentary Stamp Act and are therefore taxable thereunder.

EXCISE TAXES

January 16, 1942.—042-36.

DOCUMENTARY STAMP TAX—COLLATERAL AGREEMENT FORMS

QUESTION: Are forms used by banks for demand loans subject to the provisions of Chapter 15787, Acts of 1931, known as the Florida Documentary Stamp Act?

To Hon. J. M. Lee, Comptroller:

(Amendment to opinion rendered December 5, 1941, 041-677.)

Since writing the opinion captioned as above to you of December 5th I have found that many banks had in good faith followed the opinion of a former Attorney General of June 4, 1934, holding that the particular instruments set forth in my letter to you of December 5th were not taxable and that if my opinion to you of December 5, 1941, was construed as to operate retroactively it would be difficult for the banks to collect the amount of stamp tax from the customer that would be due upon all instruments taken prior to December 5, 1941.

This is, therefore, to advise that my opinion of December 5, 1941, should not be construed as retroactive and therefore instruments covering transactions prior to December 5, 1941 should not be taxed. My opinion to you of December 5, 1941, is therefore amended accordingly.

TAXATION AND FINANCE—Excise Taxes**EXCISE TAXES**

April 21, 1941.—041-210.

DOCUMENTARY STAMP TAX—CONVEYANCES—COUNTY BOARD OF PUBLIC INSTRUCTION

QUESTION: Are conveyances or obligations of County Boards of Public Instruction subject to the State Documentary Tax prescribed in Section 1279 (111), Compiled General Laws of 1927, Permanent Supplement, Chapter 15787, Acts of 1931, Extra Session?

To Hon. Colin English, State Superintendent of Public Instruction:

A County Board of Public Instruction is not a person, firm, association or corporation within the contemplation of that Act. The rule established by the Florida Supreme Court in *State ex rel. Packard vs. Cook*, 108 Fla. 157, 146 So. 223, with reference to Chapter 15787, is that

"... if there is any doubt as to the liability of an instrument to taxation under the act, the construction is in favor of exemption, because a tax cannot be imposed without clear and express words for that purpose."

I see no intent in this Act to cover instruments executed by governmental bodies like a County Board of Public Instruction.

In an opinion dated January 11, 1932, reported in Biennial Report of the Attorney General, 1931-1932, page 609, this office specifically held that a promissory note executed by a county school board was exempted from the stamp tax on the ground that it was a governmental or State agency negotiating the note. In the same Biennial Report, on pages 486, 872, 889, and 892, this office rendered additional opinions to the effect that instruments executed by governmental agencies were exempted from the provisions of the Documentary Stamp Tax Law.

EXCISE TAXES

June 29, 1942.—042-328.

DOCUMENTARY STAMP TAX—DEED BY SPECIAL MASTER

QUESTION: The Circuit Court of Jackson County has been presented with a deed executed by a Special Master in Chancery appointed by the Court in a suit for the foreclosure of delinquent City taxes in a suit in which the City of Marianna was plaintiff. Does said deed require Documentary Stamps under the Laws of Florida?

To Hon. Doc Grant, Clerk, Circuit Court, Jackson County, Marianna, Fla.:

This office ruled on October 5, 1932, when the late Cary D. Landis was Attorney General, that—

"Master's deed conveying property to a municipality for delinquent taxes due said municipality, is required to have the documentary stamp, provided by Chapter 15787, Acts of 1931, regardless of whether the municipality pays such tax . . ."

See Biennial Report of the Attorney General for 1931-32, page 724.

This construction has been followed since that time and it has never been questioned. I therefore concur in same and hold that the Master's Deed, under the above facts, must bear documentary stamps.

TAXATION AND FINANCE—Excise Taxes

EXCISE TAXES

October 13, 1941.—041-573.

DOCUMENTARY STAMP TAX—NOTICES OF LIENS

QUESTION: Should documentary stamps be placed on Notices of Liens on motor vehicles?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 1279 (111), Compiled General Laws of Florida, 1927 Permanent Supplement is as follows:

"On and after July 28, 1931, there shall be levied, collected and paid for and in respect of the several documents, bonds, debentures or certificates of stock and indebtedness, and other documents, instruments, matters, writings, and things mentioned and described in Schedule A, or for or in respect of the vellum, parchment, or paper upon which such document, instrument, matter, writing, or thing, or any of them, are written or printed by any person, firm, association, or corporation who makes, signs, executes, issues, sells, removes, consigns, assigns, or ships the same, or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned, or shipped in the State of Florida, the taxes specified in said Schedule A. . . .

" . . . On promissory notes, non-negotiable notes, written obligations to pay money, assignments of salaries, wages, or other compensation, made, executed, delivered, sold, transferred, or assigned in the State of Florida, and for each renewal of the same on each one hundred dollars of the indebtedness or obligation evidenced thereby, ten cents. Mortgages which incorporate the certificate of indebtedness, not otherwise shown in separate instruments, are subject to the same tax at the same rate."

Section 1 of Chapter 20917, Laws of Florida, Acts of 1941, is as follows:

"Section 1. No liens for purchase money or as security for a debt in the form of retain title contract, conditional bill of sale or chattel mortgage or otherwise, on a Motor Vehicle, as now or may hereafter be defined by law shall be enforceable in any of the courts of this State, against creditors or subsequent purchasers for a valuable consideration and without notice, unless a sworn notice of such lien, showing the following information, viz:

- "1. Name and address of the registered owner.
- "2. Date and amount of lien.
- "3. Description of the Motor Vehicle, particularly showing make, type, motor and serial number, and

"4. Name and address of lien holder
shall be recorded in the office of the Motor Vehicle Commissioner of the State of Florida which filing is in lieu of all filing and recording now required or authorized by law, and shall be effective as constructive notice when filed, provided, however, that this Act shall not apply or be effective as to any retain title contract, conditional bill of sale, chattel mortgage or other like instrument executed prior to the effective date of this Act, nor to any retain title contract, conditional bill of sale, chattel mortgage or other like instrument covering any new or used motor vehicle floor plan stock of any motor vehicle dealer."

TAXATION AND FINANCE—Excise Taxes

The notice contemplated by this Section is required to be executed by the lien holder only. It is merely notice of the existence of a lien and is not a written obligation to pay money within the meaning of Section 1279 (111) Compiled General Laws of Florida. A retain title contract, conditional bill of sale or chattel mortgage on a motor vehicle must have affixed thereto documentary stamps evidencing payment of the excise tax, as these instruments are written obligations to pay money and are signed by the obligor.

It is therefore my opinion, that the Notices of Liens provided for by Chapter 20917, Acts of 1941, need not have affixed thereto documentary tax stamps unless such notices are themselves the original obligations to pay money or renewals thereof.

EXCISE TAXES

March 3, 1941.—041-112.

DOCUMENTARY STAMP TAX—VOTING TRUST CERTIFICATES

QUESTION: The Florida East Coast Hotel Company was incorporated in the year 1897. On January 22, 1941, it was reincorporated under the 1925 Corporation Law with very few changes in the original charter powers, but the prior outstanding 35,000 shares of capital stock, with a par value of \$100.00 per share were reclassified on a basis of 10 shares for one, into 3500 shares of capital stock without nominal or par value. On January 31, 1941, all the holders of shares of the capital stock of the Florida East Coast Hotel Company entered into a voting trust agreement with three voting trustees. All of the capital stock of the Florida East Coast Hotel Company is and has been owned for a number of years by the trustees under the last will and testament of Mary Lily Flagler Bingham, deceased, except for a few qualifying shares for the directors. Should Florida Documentary Stamps be attached to the voting trust certificates for 3500 shares by the voting trustees to the Bingham Trustees? It is contended that no taxes are due because the certificates are not issued by the corporation.

To Hon. J. M. Lee, Comptroller:

I have examined the Voting Trust Certificates that are attached to the Voting Trust Agreement as Exhibit A. I find this paragraph therein:

"This Certificate is transferable on the books of the Voting Trustees by the registered holder hereof in person or by an attorney duly authorized according to such rules as may be established for that purpose by the Voting Trustees, and on surrender hereof; and the Voting Trustees may treat the registered holder hereof as the owner hereof for all purposes whatsoever and shall not be affected by any notice to the contrary. As a condition of making or permitting any transfer of this Certificate the Voting Trustees may require the payment of a sum sufficient to pay the reasonable cost of making such transfer and to reimburse them for any stamp tax or other charge incident thereto."

I am of the opinion that if this paragraph was eliminated there would be no question as to whether or not documentary stamp tax should be placed upon said certificates, but the effect of this paragraph is to give the holder of such Certificate the right to sell the same as if it were a share of stock; the only difference between this and a share of common stock is that the holder does not have the right to vote the same.

The provisions of our statute with reference to excise tax on documents, being Section 1279 (111), Compiled General Laws, Permanent

TAXATION AND FINANCE—Excise Taxes

Supplement, under Schedule A, where it is provided in the third paragraph thereof:

"On all sales, agreements to sell, or memoranda of sales or deliveries of, transfer of legal title to shares, or certificates of stock or profits or interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock interest, rights or not, on each one hundred dollars of face value or fraction thereof, ten cents; and where such shares are without par or face value, the tax shall be ten cents on the transfer or sale or agreement to sell on each share: . . ." seems to me to contemplate that agreements of the kind in question are taxable thereunder. You will note that in this particular paragraph the word "corporation" is not used in connection with the sale of stock, et cetera.

As I have pointed out, if this Certificate was in the nature of a simple deposit receipt and had not been made negotiable by the terms of said Certificate, I do not think it would be taxable. Otherwise, the law could be easily evaded by the setting up of Voting Trustees and issue certificates similar to the one issued here by the Trustees, and then such Certificates could be sold and passed from hand to hand without the payment of any documentary stamp tax. While I do not say this was the purpose of the Voting Trust Agreement and Certificates issued thereunder that we are now considering, I must look at it from a standpoint of what could happen.

Question No. 3 is:

Should Florida Documentary Stamps be attached to the transfer of voting trust certificates by the Bingham Trustees to the three beneficiaries of the Bingham Trust if the transfer is made outside of the State of Florida, and such transfer recorded on the corporate records of Florida East Coast Hotel Corporation in the State of Florida?

It is contended that a transfer of voting trust certificates by the Bingham Trustees to the three beneficiaries of the Bingham Trust if made outside the State of Florida would not come within the language of the Act and would, therefore, not be subject to the Florida Tax.

I cannot agree with this conclusion for the reason that regardless of where the actual transfer takes place, before the Trustees can recognize the same, under Paragraph 8 of the Voting Trust Agreement, the Voting Trust Certificates issued to the Bingham Trustees would have to be surrendered

"properly endorsed for transfer, to the Voting Trustees at the office of the Corporation or such other place as may be agreed upon between the holder and the Voting Trustees."

From a consideration of the entire Voting Trust Agreement, it seems to me that same contemplates that before any transfer of a Voting Trust Certificate is effective, such transfer must be noted upon the books of the Voting Trustees at the office of the Corporation in the State of Florida, and, also, upon the books of the Corporation.

By analogy, the case of *Bickell vs. Lee*, 5 Fed. Supplement, 720, is in point. The Court said:

"However, where a sale is made of stock of a Florida corporation and a transfer made upon the books of the corporation in Florida, the

TAXATION AND FINANCE—Excise Taxes

State may properly tax the transfer as one made within the State. See *People ex rel. Hatch v. Reardon*, supra."

LICENSE TAXES

April 2, 1942.—042-158.

INSURANCE—DEDUCTION OF "CASH SURRENDER VALUES" FROM TAXABLE GROSS PREMIUMS

QUESTION: Should the State Insurance Commissioner allow deductions of the "cash surrender values" for the period between January 1, 1941, and May 29, 1941, by insurance companies from the taxable premiums reported for the fiscal year ended December 31, 1941? In this connection attention is called to the fact that Chapter 20517, Acts of 1941 became effective May 29, 1941.

To Hon. J. Edwin Larson, Insurance Commissioner:

Chapter 20517, Acts of 1941, provides that taxes on premiums shall be calculated "upon gross premiums received, omitting premiums on reinsurance accepted, and less return premiums, but without deductions for reinsurance ceded to other companies, and without deductions for moneys paid upon surrender of policies for cash surrender value . . ."

In the case of *Volunteer Life Insurance Company versus Larson*, (2 So. 2d. 366), the Supreme Court in discussing Chapter 19501, Acts of 1939, said that it was a taxation statute and it could be presumed that the Legislature placed therein and omitted therefrom items and things intended to be taxed or omitted from taxation, and in said opinion the Court held that deductions claimed as the cash surrender value of policies paid to policyholders during the fiscal year should have been allowed from the total taxable premium.

However, during the time the above case was being considered by the court, the chapter there under consideration was amended by Chapter 20517, Acts of 1941, supra, and section 1 of the amending act very clearly shows that the legislature was seeking to clarify the very question then before the court.

Therefore the 1941 act, above referred to, is a legislative determination, that the law never at any time contemplated the deduction of the "cash surrender values" from the taxable gross premiums, and you are not authorized to permit the deduction of such "cash surrender values" for the period between January 1, 1941, and May 29, 1941, from the taxable premiums reported for the fiscal year ended December 31, 1941, by insurance companies without appropriate court order therefor.

LICENSE TAXES

April 15, 1942.—042-189.

INSURANCE—DEDUCTION OF DIVIDENDS APPLIED TO PAY RENEWAL PREMIUM OR IN REDUCTION OF PREMIUM

QUESTION: (1) When dividends are applied in reduction of premiums or to pay renewal premiums is amount of such dividends deductible from the total amount of taxable premiums?

(2) Should the 2% premium tax be required on total amount of deductions of such dividends applied to pay renewal of or reduction of premiums for the period in which such deductions were made, of the Sun Life Assurance Company of Canada?

TAXATION AND FINANCE—License Taxes

To Hon. J. Edwin Larson, Insurance Commissioner:

(1) Such dividends are not deductible from the amount of taxable premium.

(2) The 2% premium tax should be required on the total amount of deductions of such dividends applied to pay renewal of or reduction of premiums for the period in which such deductions were made.

My reason for this opinion is based on the wording of Section 1, Chapter 20517, Acts of 1941, as follows:

"Section 1. That all taxes on premiums from policy holders received by persons, firms, associations, or corporations authorized to transact an insurance business on risks to persons or property in the State of Florida, and required by law to be paid to the State Treasurer, shall, unless specifically provided otherwise by later statute, be calculated upon gross premiums received, omitting premiums on reinsurance accepted, and less return premiums, but without deductions for reinsurance ceded to other companies, and without deductions for moneys paid upon surrender of policies for cash surrender value, and without deductions for discounts or refunds for direct or prompt payment of premiums, and without deduction on account of dividends of any nature or amount paid, credited or allowed to policy holders. Tax returns shall be made on forms to be prescribed by the State Treasurer and shall be sworn to by one or more of the executive officers of the companies or associations making such returns."

There is also authority for this opinion and I refer you to the case of *Volunteer State Life Insurance Company v. Larson*, State Treasurer (2 So. 2d. 386), in which the Court held that dividends as applied in payment of premiums are not deductible from the tax.

LICENSE TAXES

March 10, 1941.—041-118.

INSURANCE—DEDUCTION OF 10% OF PREMIUM FOR DIRECT PAYMENT

QUESTION: Is the amount returned to policy-holders in consideration of direct payment of weekly premiums at home office or district offices a proper and legal deduction from the amount collectable as 2% gross premium tax under Sec. 1182, C. G. L. as amended by Chapter 19501, Laws of 1939?

To Hon. J. Edwin Larson, Insurance Commissioner:

Section 1182, C. G. L. provides that each insurance company shall pay to the State Treasurer a license tax of \$200.00 and in addition thereto, the insurance companies shall, on or before the first day of March of each and every year, pay to the State Treasurer:

"2% of the gross amount of receipts of premiums from policy-holders in Florida, less return premiums and premiums for reinsurance in companies authorized to transact business in Florida . . ."

Chapter 19501, Laws of 1939, amended this Section by providing that the tax:

"be calculated upon gross premiums received, omitting premiums on reinsurance accepted, and less return premiums and cancellations, but without deductions for reinsurance ceded to other companies."

TAXATION AND FINANCE--License Taxes

I call your attention to the following definitions of the term "gross" and the term "premium."

"Gross means whole, entire, total; Gross means whole, entire, total, without deductions—as the gross sum or gross amount; gross weight opposed to net." (Words and Phrases, Perm. Add. Vol. 18, p. 697.)

"The term 'premium' relates to the stipulated periodical payment exacted from the holder of an insurance contract; The sum which the insured is required to pay is called the premium; The word premium with reference to insurance contracts usually refers to the amount in cash which the insured pays to the insurer for keeping the policy in force during a stated period." (Words and Phrases, Perm. Add. Vol. 33, p. 370.)

"The word 'gross' is defined: 'Whole; entire; total; without deduction;'" (Webster's Dictionary; Scott vs. Hartley, 126 Ind. 246, 25 N. E. 826).

The Supreme Court of various states has construed statutes similar to ours in the following manner and I call your attention to the following decisions:

"The language under consideration in the statute is: 'The gross amount of premiums received in the State.' There is no ambiguity in the language of the statute, and there can be no doubt as to what its ordinary meaning is. The rule governing the interpretation of such language is thus stated in *Chambers v. Hill*, 26 Tax. 472: 'Where language is plain and unambiguous, there is no room for construction. It is never admissible to resort to subtle and forced constructions to limit or extend the meaning of language. And, where words or expressions have acquired a definite meaning in law, they must be so expounded.' Under the rule of interpretation just quoted there is no room for construction of the language of the statute. It just simply means *that the entire sum received by such insurance companies as premiums in this state should be the basis upon which to estimate the occupation tax required to be paid by such companies.*" (*Fire Ass'n of Philadelphia v. Love*, 108 S.W. 158,160.)

"It appears to us quite clearly that the plain intent of the statute is that the company should be liable to pay the tax on the premium fixed in the policy, for that is the premium contracted for in the policy for each and every year until it matures. Were it not so intended, certainly an exemption from liability on account of dividends would have been provided for in the statute." (*Cochrane v. National Life Ins. Co.* 235 Pac. 569, 570).

"The word 'premiums' as used in the act is to be given the construction placed upon it by *ordinary usage*, and in accordance with its apparent meaning when used in insurance policies, and which is placed upon it by agents of insurance companies in dealing with the public, *which includes the maximum table rate premium stipulated in the policy*, the payment of which the company can exact as a condition precedent to keeping the policy in life, and which in fact it does exact when the insured's obligation to pay it is discharged by the company crediting the payment with the so-called 'dividend.' (*New York Life Ins. Co. vs. Wright*, 122 S. E. 706.)

"Under Code Supp. 1913, Sec. 1333, relative to the taxation of foreign insurance companies on the gross amount of premiums received by them for business done in this state, the 'gross premium' which is used as the basis for computing the taxation is the table or contract premium without deductions for dividends, deferred dividends, or sur-

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render value payments." (New York Life Ins. Co. vs. Burbank, 216 N. W. 742, 5th syllabus.) (See also King vs. Aetna Ins. Co. 167 S. E. 12, 19.)

The Supreme Court of New Mexico and of California has construed the meaning of the term "return premium" in the statutes of their respective states and I call your attention to the following decisions:

"The phrase 'return premiums' had acquired a limited and technical significance, not only in this state, but generally in the insurance world, which meaning had become so definitely fixed as to have found a place in the law dictionaries and in the recognized textbooks upon fire and life insurance. In Black's Law Dictionary the phrase is listed and is defined to mean:

"The repayment of the whole or a ratable part of the premium paid for a policy of insurance upon the cancellation of the contract before the time fixed for its expiration."

"In Bouvier's Law Dictionary the phrase is also found and is similarly defined. In Joyce on Insurance and also in Elliott on Insurance—the two main modern textbooks on this branch of the law—there are to be found in each an entire subdivision devoted to the subject of 'return of premiums and assessments,' in which these terms are given application to cases wherein the risk *has not attached*, or *where the policy is void*, or *has been issued through a mistake of law or fact*, or has been procured through fraud and the like, and wherein the use of the phrase is limited to the class of cases above enumerated . . .

"And to this statement may be added another and a conceded fact by the parties herein, which is that the phrase 'return premium' had never, prior to the adoption of the said amendment to the Constitution, been used or employed by mutual benefit insurance companies or associations anywhere in relation to the excess in the income of these concerns distributed periodically among their members . . .

" . . . but, in the absence of such a differentiation, we are constrained by rules of interpretation, too well known to require a recital, to the giving to the phrase 'return premiums,' as used generally in the clause of the amendment to the Constitution, *the one and only meaning which had been universally assigned to it for a long time prior to the date of the adoption of said amendment and which it bore by general acceptance at that time*. Its meaning and application as thus interpreted must be confined to that portion of the premium of all insurance companies or associations affected by the amendment which has, for the reasons above referred to, *been unearned*, and to the return of which the insured has a right enforceable at law . . ." (Northwestern Mut. Life Ins. Co. v. Roberts, 171 Pac. 313, 314, 315.)

"All moneys returned or allowed in abatement of future premiums to policy holders in a mutual life insurance company, *which arise by reason of an overcharge on the actual cost of insurance occasioned by the overestimation of the death rate and administration expenses and the underestimation of the earnings on premiums by way of interest and gains by reason of lapses and forfeitures by the insurance company when it fixes the arbitrary level premium in its policies*, are 'returned premiums,' within the meaning of Section 2810, Code 1915, and, as such, are exempt from taxation under said section." (New York Life Ins. Co., 153 Pac. 303, syllabus.)

I understand that throughout the past many years the Insurance Department of Florida has construed the term "return premiums" as not including refunds or discounts for direct payments. I call your attention, therefore, to the holding of our Supreme Court *that a practical construc-*

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tion of a statute by a governmental agency, while not of such high authority as a judicial interpretation, is, when not in conflict with some provision of the Constitution or plain intent of the act entitled to great value in determining the real meaning of a statute.

State v. Bryan, 39 So. 929;
Amos v. Mosely, 77 So. 619;
State v. Leatherman, 128 So. 21;
Robinson v. Fix, 151 So. 512;
State ex rel. Woodward v. Lee, 115 So. 138;
State ex rel. Bennet v. Lee, 166 So. 565;
State ex rel. Franklin County v. Lee, 188 So. 775.

It is my opinion that the refunding of 10% of the premium because of direct and prompt payment is not deductible under the provisions of Section 1182, C.G.L. as amended, because said item does constitute "gross premium" and because said item does not come within the meaning of the phrase "return premium."

LICENSE TAXES

March 1, 1941.—041-97.

INSURANCE—GROSS PREMIUM TAX

QUESTION: Are foreign title insurance companies required to include in their return as gross premiums, and to pay 2% tax thereon, under Sec. 1182, C. G. L. as amended, such charges as attorney fees, abstract costs, escrow fees, etc., charged by local abstracting companies when said charges are not received by said companies, nor are the charges set by them?

To Hon. J. Edwin Larson, State Treasurer:

I call your attention to the fact that Sec. 1182, C.G.L. as amended, is a statute exacting a tax and a strict construction is placed upon taxing statutes, penal statutes and all statutes which exact a penalty or a tax.

I am given to understand that the foreign title insurance companies issue their policy of insurance when their agent receives an opinion or certificate from an approved title examining attorney that the title is such as may be insured; the title insurance company not being concerned about such charges as abstract costs, escrow fees, fees of the examining attorney or other miscellaneous charges for the reason that the local abstracting company makes these charges and collects payment thereof, which is not remitted to the title insurance company, the only remittance to the title insurance company being the premium on the policy.

It is my opinion that the Legislature intended by the clause "2% of the gross amount of receipts of premiums . . ." to mean the contract premium received by the insurance company and not miscellaneous charges that may be exacted by local abstracting companies who act as agents for the title insurance companies.

LICENSE TAXES

August 5, 1941.—041-422.

INSURANCE—GROSS PREMIUM TAX—REFUND

QUESTION: The State Life Insurance Company of Indianapolis, Indiana, has made a claim for refund of two per cent on the cash sur-

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render value paid or credited to policyholders, residents of the State of Florida, for the year ending December 31, 1940. Is such claim valid?

To Hon. J. M. Lee, Comptroller:

In my opinion, you should not recognize this claim for the following reasons:

- (1) It does not appear that the payment of this tax was made under protest.
- (2) There is grave doubt, in my opinion, as to whether Section 3, Chapter 19501, Laws of Florida, Acts of 1939, is mandatory or permissive.
- (3) There is likewise serious doubt, in my opinion, as to the right of insurance companies to include within the meaning of the phrase "moneys paid out upon cash surrender of policy," moneys advanced on policy loans, which in the instant case the company is attempting to do.
- (4) That to rule on the validity of the claim in the instant case would have such far-reaching effects, there being so many insurance companies similarly affected, that it is my advice to you that this claim be not approved for payment until a court of competent jurisdiction has approved the lawfulness of same.

LICENSE TAXES

October 1, 1941.—041-553.

INSURANCE ADJUSTERS—DEFINITION

QUESTION: Whether a distinction should be made under Sec. 1182, C. G. L. in licensing adjusters who work on salary basis and independent adjusters who adjust for several companies on a fee basis.

To Hon. J. Edwin Larson, Insurance Commissioner:

No distinction should be made between the licensing of these two classes of adjusters because (1) the wording of the statute requires the payment of the license tax by those *who adjust losses* in this State. To hold that the Act is only applicable to independent adjusters who adjust on a fee basis is to write into the Act an exemption not contemplated by the Legislature; and (2) administrative construction of a statute will be followed by the courts unless the administrative construction violates organic law or the plain intent of the Act; and (3) **WORDS AND PHRASES**, permanent edition, vol. 2, pages 423 and 424, in the definition of the term "adjuster" makes no distinction between salaried adjusters and independent adjusters on a fee basis.

LICENSE TAXES

April 2, 1942.—042-154.

INSURANCE ADJUSTERS—COUNTY OCCUPATIONAL LICENSES

QUESTION: Is an insurance adjuster licensed by the State Insurance Commissioner, domiciled in Polk County, who adjusts claims for his company in Polk County and in other counties of the State, liable for the payment of an occupational license tax in Polk County?

To Hon. J. Edwin Larson, Insurance Commissioner:

In my opinion to you dated February 14, 1942, (042-87) with reference to county occupational licenses for insurance agents, solicitors.

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and adjusters, I said that it was my opinion that a county may require a license tax of each insurance adjuster not to exceed fifty per cent of the State license tax of \$10.00, unless such adjuster has paid an agent's license, in which event the county may require a license of such adjuster not to exceed fifty per cent of the agent's license paid by such adjuster to the State Treasurer.

With particular reference to your present question, it is my opinion that the statute contemplates that the county occupational license shall be payable in the county of the adjuster's residence, but not in each county where the adjuster may adjust claims.

LICENSE TAXES

February 14, 1942.—042-87.

INSURANCE AGENTS—COUNTY OCCUPATIONAL LICENSES

QUESTION: (1) Would each of three insurance agents licensed by the State Treasurer in one agency office be required to pay a county occupational license tax, or would one license tax for the agency be sufficient?

(2) Is an insurance solicitor subject to the same occupational license tax as an agent, where the solicitor is licensed by the State Treasurer only at the request of and for the agent?

(3) Is an insurance adjuster subject to an occupational license tax?

To Hon. J. Edwin Larson, Insurance Commissioner:

With reference to your first and second questions, it is my opinion that the county may require a license tax of each such agent and each such solicitor, not to exceed 50% of the State license tax of \$6. See Section 1182, Compiled General Laws, as to agent's license, and Section 2, Chapter 17069, Acts of 1935, and Section 2, Chapter 20956, Acts of 1941, as to solicitor's license.

Answering your third question, it is my opinion that the county may require a license tax of each insurance adjuster, not to exceed 50% of the State license tax of \$10, unless such adjuster has paid an agent's license, in which event the county may require a license of such adjuster not to exceed 50% of the agent's license paid by such adjuster to the State Treasurer. See Section 1182, Compiled General Laws, and Section 2, Chapter 20956, Acts of 1941.

LICENSE TAXES

March 7, 1942.—042-116.

INSURANCE AGENTS—COUNTY OCCUPATIONAL LICENSES

QUESTION: May the State Insurance Commissioner impose a county occupational license on one soliciting general and not life insurance?

To Hon. J. Edwin Larson, Insurance Commissioner:

I call your attention to my opinion to you dated February 14, 1942 (042-87), in which I held that a county may require a license tax of an insurance solicitor. That ruling was based upon Section 2, Chapter 17069, Acts of 1935, and Section 2, Chapter 20956, Acts of 1941. The provisions of the statutes referred to specifically refer to "the general insur-

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ance business or any special line thereof which may lawfully be written in this state."

The statutes provide that no solicitor shall be licensed or permitted to transact business as solicitor for or on behalf of more than one insurance agent writing the same character of contracts of insurance. On the other hand, insurance agents may represent more than one company and a license tax must be paid for him for each company represented by him.

In the letter accompanying your request, particular reference is made to the fact that real estate salesmen are not required to pay occupational licenses. They are, as a matter of fact, specifically exempt from such tax by Section 10, Chapter 20956, Acts of 1941.

LICENSE TAXES

March 7, 1942.—042-118.

INSURANCE AGENTS—COUNTY OCCUPATIONAL LICENSES

QUESTION: A number of agents in Polk County are listed in the October 1941 report of the Insurance Commissioner as being licensed as insurance agents by the State. They claim now to be no longer representing the company which they were licensed by the State to represent and have not issued any business through such company, stating that if they do, they will pay the necessary county occupational license. Under such circumstances what is the liability of the agent for the county occupational license tax?

To Hon. J. Edwin Larson, Insurance Commissioner:

Occupational licenses are due and payable on the first day of October of each year, and the Insurance Commissioner is required by statute to transmit to the various tax collectors of the state the name and address of every agent licensed by him as resides respectively in said county. The county may then require an occupational license tax of such agent.

It is my opinion that an insurance agent licensed as such by the Insurance Commissioner as of the first day of October of each year, is liable for a county occupational license tax as such agent. These license taxes are payable in advance, and if the agent in fact severs his connection with the company he is licensed by the Insurance Commissioner to represent, before he has paid his county occupational license tax, and before he has solicited or written any business for such company, he would no longer be liable for the county occupational license tax. If, on the other hand, he continues to hold himself out to the public as agent for such company, and is ready, willing and able to write business for such company, he is then liable for the county occupational license tax, whether he has in fact written any business for such company or not during the taxable year.

LICENSE TAXES

February 5, 1942.—042-62.

INSURANCE AGENTS—RENEWAL OF LICENSES

QUESTION: Has the Insurance Commissioner authority to assure those insurance agents now licensed that if they enter the armed forces of the United States they will be re-licensed upon their return without reexamination and therefore without payment of the \$10.00 examination

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fee, even though their license may have expired more than twelve months before their return?

To Hon. J. Edwin Larson, Insurance Commissioner:

The clear intent of the Federal law relating to service in the military forces of the United States during the present emergency is to protect, so far as possible, the civil rights of persons serving in the armed forces of this country. Such persons are considered as being on furlough or leave of absence from their civil occupations or employment during the period of time they are serving in the armed forces of their country.

Since this is true, you are justified, in my opinion, on the basis of public policy alone, in treating licensed insurance agents who are actually serving in the military forces of the United States, as being on furlough or leave of absence from their private employment, and waiving, so far as such licensed insurance agents are concerned, those requirements of Chapter 20263, Laws of Florida, Acts of 1941, relating to re-examination and payment of the examination fee. I do not mean by this that the agent would not be liable for the payment of his occupational license tax upon his termination of services in the armed forces of the United States.

LICENSE TAXES

February 10, 1941.—041-58.

INVALIDS—EXEMPTION

QUESTION: Are persons who have been disabled by tuberculosis and who are incapable of manual labor and must exercise great care in the selection of an occupation, and persons afflicted with serious defects of the heart which greatly handicap them in earning a living, exempt from payment of license fees under Section 27, Chapter 18011, Acts of 1937?

To Hon. Colin English, State Superintendent of Public Instruction:

Upon examination of the law involved, it is my opinion that it is possible for a person disabled by tuberculosis or serious heart defects to come within the exemption provided, as an invalid physically incapable of manual labor.

At first reading, one might think that a person with tuberculosis or a heart disease did not have a physical incapacity, but undoubtedly that term refers to the internal parts of the body as well as the external. (See, for instance, the opinion in *Wright v. Louisiana Ice & Utilities Co.*, La., 129 So. 436.)

A person afflicted with tuberculosis or heart trouble may, of course, be an invalid as that term is used in Section 27. The only case which I find defining the word "invalid" as used in the statute, was in the case of *Walling v. State*, 89 Tex. Cr. R. 613, 232 S. W. 1115, in which the Court held that a person afflicted with cancer, who had been advised by his physician not to do physical work, was an "invalid."

It will be noted, however, that Section 27 lays down certain requirements before a person can be exempted from the payment of the license tax, with the additional requirement of the certificate of the county physician or other reputable physician that the applicant is a confirmed cripple or invalid.

As the Florida Supreme Court said in the case of *Harper vs. England*, 124 Fla. 296, 168 So. 403, with reference to a license tax:

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"It also appears to be well settled that he who would shelter himself under an exemption clause must clearly show that he is entitled under the law to exemption, and the law is to be strictly construed as against the person claiming the exemption and in favor of the public. 17 R.C.L. 522; Northwest Auto Co. v. Hudburt, 104 Or. 398, 207 P. 161; Wallace v. Board of Equalization, 47 Or. 584, 86 P. 365. It is also held that under a registration law, such as that we have under consideration, the collection of a fee for registration is the rule and the exemption is the exception to the rule. Therefore, he who claims the exemption bears the burden of establishing his right to it. 1 Cooley on Taxation (3d Ed.) 456; Camas State Co. v. Kozar, 104 Or. 600, 209 P. 95, 25 A.L.R. 27."

Therefore, it is my opinion that a person with heart trouble or tuberculosis may come within Section 27, although the person applying for the exemption must satisfy the strict requirements that he be an invalid, that he be physically incapable of manual labor (although this requirement must be sensibly construed), and that he furnish a certificate from his physician that he is a confirmed invalid.

LICENSE TAXES

April 3, 1942.—042-155.

MUTUAL INSURANCE COMPANIES—INTERPRETATION

QUESTION: Does Section 13 of Chapter 20263, Acts of 1941, repeal that part of Section 1182, Compiled General Laws, 1927, which exempts mutual insurance companies from the taxes imposed by said section?

To Hon. J. Edwin Larson, Insurance Commissioner:

Chapter 20263, Acts of 1941, is a regulatory Act and applies only to fire insurance and its allied lines, marine insurance, and also contracts of indemnity, fidelity, and suretyship. It does not apply to life insurance companies or associations or to sick and funeral benefit associations. (See Section 9 of said Chapter 20263.) Therefore, it does not repeal the provisions of Section 1182, *supra*, exempting mutual companies doing life, sick, and funeral benefit insurance business.

With reference to mutual companies engaged in the business of fire insurance and its allied lines, marine insurance, and also contracts of indemnity, fidelity, and suretyship, it is my opinion that Chapter 20263 does not repeal the proviso contained in Section 1182, *supra*, because Section 2 of the 1941 Act levies a tax *in addition to* the tax levied in Section 1182 *on the companies mentioned in said Section 1182*. This clearly indicates to me an intent to tax in Section 2 of Chapter 20263 only such companies as are taxed in Section 1182, thus continuing the exemption of mutual companies organized and doing business in the State of Florida.

However, the only exemption granted such mutual companies in Section 1182 is from the taxes therein mentioned, and it is my opinion that the only exemption running to such mutual companies under Chapter 20263, *supra*, is from the additional tax levied in Section 2 of said Act. While this would exempt mutual fire insurance companies, about whom you have specifically inquired, from the additional tax imposed by Section 2 of Chapter 20263, and referred to as a qualification tax, it would not relieve the agents, solicitors, and adjusters of such mutual insurance companies from paying the examination fee also mentioned in said Section 2 of the 1941 Act, nor would it relieve such agents, solicitors, or adjusters from the other regulatory provisions of said Act.

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February 3, 1941.—041-29.

PHARMACISTS—WORLD WAR VETERAN—EXEMPTION

QUESTION: The law provides for an exemption to World War Veterans for the payment of licenses up to \$50.00. Druggists are required to pay to the State Board of Health a \$10.00 fee. Is this fee of \$10.00 of the character for which Dr. Frank P. Hill, a World War Veteran who operates a pharmacy, is allowed exemption?

To Hon. Pat Whitaker, Attorney at Law, Tampa, Florida:

Chapter 16299, Acts of 1933, provides for the exemption of disabled veterans of the World War and the Spanish American War.

Section 1, after defining the section, further goes on to state that the exemption is for a license to carry on "business or occupation, . . . which may be carried on mainly through the personal efforts of the licensee as a means of livelihood." This has been construed by this office in many cases to cover only the occupational license paid to the county tax collector for carrying on a business. This would include the professional license under Section 10 of Chapter 18011, Acts of 1937, or any store license which the veteran might have to pay.

There are two acts which require a payment of an annual registration fee by pharmacists. One is an act of 1939, Chapter 19323, which increased the annual registration fee to \$5.00, payable to the Board of Pharmacy, and which the act provides "shall be used by the Board of Pharmacy in the execution of its duties and for the advance of arts and science of pharmacy."

The other is an act of 1927, Chapter 11859, which places the enforcement of the rules and regulations of the Board of Pharmacy upon the State Board of Health and requires an annual registration of drug stores with the State Board of Health for which a fee of \$10.00 is charged, "said fee so charged to be used by the State Board of Health to defray expenses necessarily incurred by the State Board of Health in the enforcement of the provisions of law."

Section 10 of Occupational License Act (Chapter 18011, Acts of 1937), after setting forth the requirement as to the tax upon professions, states "which license tax shall not relieve the person paying same from the payment of any license tax imposed on any business operated by him."

Section 35 of this Act is as follows:

"Fees or licenses paid to any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes shall be in addition to and not in lieu of any occupational license tax required by this law or other law unless otherwise expressly provided by law."

This office has uniformly construed Section 35 above to require the payment of registration or inspection fees, such as are here required for pharmacists under Chapter 11859 and Chapter 19323.

LICENSE TAXES

January 30, 1941.—041-22.

PHRENOLOGIST—OCCUPATIONAL TAX

QUESTION: In a case where a business is licensed under Chapter 16848 as a retail dealer in merchandise, will an additional license be re-

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quired under Section 22 of Chapter 18011 for such a business, as an advertising or inducement feature, to give free phrenological readings to such purchaser of merchandise only, regardless of the mount of such purchase?

To Hon. J. M. Lee, Comptroller:

I have examined Chapter 16848, Acts of 1935, which is popularly known as the Gross Receipts Tax Act, and is applicable to sales of certain merchandise by a store. Chapter 18011, Acts of 1937, is popularly known as the Occupational Tax Act, and Section 22 thereof provides as follows:

"Every fortune teller, clairvoyant, palmist, astrologer, phrenologist, character reader, spirit medium, absent treatment healer . . . shall pay a license tax of \$100.00; . . ."

This, of course, simply means that before a person can engage in such occupation, he must pay his occupational tax to do so. It is to be noted that the tax is upon the person who engages in the occupation.

I am therefore of the opinion that Chapter 16848, with reference to the gross receipts tax upon a retail dealer, has no bearing upon the tax enacted by reason of a person following a particular occupation. The fact that the business, in which the phrenologist is employed as an advertising attraction, makes no charge for the phrenological readings, is beside the point. The phrenologist is being compensated for services as such, and is therefore engaged in the occupation of a phrenologist and liable for the tax provided by Section 22 of Chapter 18011 above quoted.

LICENSE TAXES

July 30, 1941.—041-413.

RESTAURANTS—CLASSIFICATION AND TAXABILITY

QUESTION: Should a licensee under Chapter 16774, Acts of 1935, requiring food to be sold where drinks are dispensed, be required to pay a restaurant license tax?

To Hon. E. W. Scarborough, Director, Beverage Department:

In view of the language of the statute, viz:

"There shall not be sold at such places of business anything other than the beverages hereby permitted and what is customarily sold in a restaurant. At all places of business where sales by the drink or for consumption on the premises are permitted, regular meals shall be offered, prepared and served, either a la carte or American plan on the premises when open for business,"

and of the definition of a restaurant as set out in Section 3354 Compiled General Laws of Florida, Permanent Supplement, as follows:

"Every building or other structure and all outbuildings in connection and any room or rooms within any building or other structure or any place or location kept, used, maintained as, advertised as, or held out to the public to be a place where meals, lunches or sandwiches are prepared or served, either gratuitously or for pay, shall, for the purpose of this law, be defined to be a restaurant, and the person or persons in charge thereof, whether as owner, lessee, manager or agent, for the purpose of this law, shall be deemed the proprietor of such restaurant, and whenever the word 'restaurant' shall occur in this law, it shall be construed to mean every such structure described in this section. (Ch. 6952, Acts of 1915, §4; Ch. 9264, Acts 1923 §4; Ch. 16042, Acts 1933, §7.)"

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I am of the opinion that a licensee under the captioned statute is required to pay a restaurant license tax also, and that the business, as such, of a restaurant, is in the purview of the statutes prescribing the powers and duties of the Hotel Commission.

LICENSE TAXES

October 9, 1941.—041-570.

STATE OWNED FARMERS' MARKETS—TAX LIABILITY

QUESTION: Is the State liable for license tax on its market or individually on the stalls therein, under Chapter 20956, Acts of 1941?

To Hon. Nathan Mayo, Commissioner of Agriculture:

Section 25 of Chapter 20956, Acts of 1941, provides:

"All farm and grove products and products manufactured therefrom, except intoxicating liquors, wine, or beer, shall be exempt from all forms of license tax, State, County and Municipal when the same is being offered for sale or sold by the farmer or grower producing the said products. The management of wholesale farmers produce markets shall have the right to pay a license of \$200.00 that will entitle their stall tenants to deal in agricultural and horticultural products without obtaining individual licenses, but individual licenses shall be required of such tenants unless such license is obtained for the market."

Section 697, Revised General Statutes, 1920, as re-enacted by Chapter 19376, Acts of 1939, provides as follows:

"697. Property exempt from taxation.—The following property shall be exempt from taxation: First, all property, real and personal, of the United States and of this State."

In 61 Corpus Juris, page 381, the following rule is stated as to State agencies and instrumentalities:

"The implied immunity from taxation of public property of states and municipalities generally extends to taxes imposed by a state upon its own governmental agencies and instrumentalities."

The second sentence of Section 25 of the foregoing statute merely extends the *privilege* or right to the management of a wholesale farmer's produce market to pay a license of \$200.00, thereby relieving stall tenants of obtaining individual licenses. Such provision *does not require* the State or management of such market to pay such license fee. In the event the management of the Sanford wholesale farmers' produce market does not elect to pay such fee, it is my opinion that the local tax collector cannot collect the same as said state property or state agency.

The first sentence of said Section 25 specifically exempts all farm and grove products and products manufactured therefrom from all forms of license tax, State, County and Municipal, when the same is being offered for sale, or sold by the farmer or grower producing said products, and the tax collector cannot collect a license from such stall tenants. Where the stalls of the market are not occupied by tenants coming within the provision of such exemption and where the management of said farmers' market has not elected to pay the license fee covering the entire market, the tax collector can collect individual licenses from the stall tenants of said market.

TAXATION AND FINANCE—License Taxes**LICENSE TAXES**

November 25, 1941.—041-662.

TAX COLLECTORS—DUTIES AND POWERS IN THE ISSUANCE OF LICENSES

QUESTION: Under Sections 19 and 20 of Chapter 20956, Acts of 1941, do Tax Collectors have the power to determine whether or not the device, contrivance, facility, or machine, the operation for which a license is sought, is such as to come under the ban of the gaming statutes of Florida?

To Hon. Spessard L. Holland, Governor:

Since the ultimate administrative power and responsibility to determine whether or not the particular machine, device, contrivance or facility is illegal, rests with the State Comptroller, Tax Collectors, when called upon to issue a license for the operation of any such device, as to the legality of which he is in doubt, should seek instructions from the official named.

In determining primarily whether or not a license should be issued, Tax Collectors possess a certain measure of discretion, and should use due diligence to ascertain the nature and manner of operation of the device sought to be licensed, and it is only in cases of reasonable doubt that a license should be refused.

If the Tax Collector submits a request to the State Comptroller for determining the legality of any particular machine, device, contrivance, or facility for licensing purposes it is the duty of the Comptroller to deal with the specific inquiry submitted, and say whether or not the device or occupation for which a license is sought, is legal.

If and when the Comptroller takes the position that the Tax Collector should issue the license, irrespective of whether the device or occupation is legally licensable, the Tax Collector has a right to have an opinion on such question, before being required to issue any such license, and may, under such latter described circumstances, submit the facts, including all available data, relative to the nature and manner of operation of any given device, to your Excellency, who may in turn require the official opinion of this office on such point, for the benefit, not only of the inquiring Tax Collector, but all other Tax Collectors in the State.

I am definitely of the opinion that Tax Collectors have, within reasonable limits, a measure of discretionary power in such matters, and that to issue a license for an illegal device or occupation, knowing, or having reasonable grounds to suspect, the same to be illegal, would amount to neglect of duty in office and a violation of public trust.

GASOLINE TAXES

February 26, 1942.—042-97.

AVIATION GASOLINE—EXEMPTION

QUESTION: Has the Governor of Florida or any other official the power to grant tax exemption to a higher octane rating of motor fuel than is granted statutory exemption from the payment of excise taxes levied by the State upon such motor fuel?

To Hon. Spessard L. Holland, Governor:

You advise that letter from the Department of Interior concerning the tax levied on 73 octane fuel states:

TAXATION AND FINANCE—Gasoline Taxes

"It is our understanding, however, that the gasoline tax law in the State of Florida requires that normal State taxes be paid on all gasolines except those used for aviation purposes which have an octane number of 80 or higher. This has the effect of placing the use of 73 octane fuel at a considerable financial disadvantage as compared with the use of 80 octane fuel and results in the marketing of a very considerable quantity of 80 octane fuel containing 1 cc of tetraethyl lead maximum in the State of Florida. The continued use of this fuel will affect in some degree our ability to supply our Army and Navy with their essential requirements, and the use of 73 octane fuel by these training schools, on the other hand, will result in an increase in cost of fuel to them of some 4 cents to 5 cents a gallon.

"The Army Air Corps has requested that the necessary immediate steps be taken to permit Army-Navy specification fuels of all grades to be marketed in the State of Florida without the motor fuel tax being applicable to aircraft engine fuel. In view of the limited quantities of the high octane base stocks for 91 and 100 octane gasoline, it is vital to the war effort that they not be used unnecessarily and wastefully in lower octane gasolines. I ask, therefore, for your assistance in this vital part of the war effort, and that you take such action as may be within your power to permit the use for aviation purposes, without tax penalty, of the lower octane aviation gasolines."

In reply wish to advise that I have examined Section 1167 (102) of the Compiled General Laws of the State of Florida, 1927, and I find that it provides as follows:

"Each and every dealer in aviation motor fuel in the State of Florida, by whatever name designated, who sells aviation motor fuel testing 78 Octane Number (A.S.T.M. Method D-357-33T) or higher, of such quality not adapted for use in ordinary motor vehicles, being designed for and sold and exclusively used for aircraft motors, shall be, and they are hereby, exempted from the payment of any and all excise taxes levied by the State of Florida upon such motor fuel."

You will note that there is no discretion placed in you or any other official to lower the octane rating of motor fuel that is granted the exemption from the payment of any and all excise taxes levied by the State upon such motor fuel. So, regardless as to how worthy the cause may be, you are wholly without power to make any change in the law, this being solely a legislative prerogative.

GASOLINE TAXES

June 30, 1941.—041-351.

COMPTROLLER: TRANSFER OF SURPLUS GASOLINE TAX FUND IN COUNTY SCHOOL FUND FOR GENERAL REVENUE FUND

QUESTION: What are the legal duties of the Comptroller under a certain-executive order signed by the Governor relating to the transfer of surplus gasoline tax funds in the county school fund for the general revenue fund, where the Governor assumed that the county school fund contains a surplus by reason of money received by it from one-half of the one cent gasoline tax?

To Hon. J. M. Lee, Comptroller:

If the Governor did intend this assumption, the next question that arises for determination, in my opinion, is—of what time "surplus" is to be ascertained.

TAXATION AND FINANCE—Gasoline Taxes

This last question seems to me to be a mixed one of law and fact. Treating it as such, it is my opinion that Chapter 19318, Acts of 1939, Section 3, in the portion thereof reading as follows:

“Provided, however, that any surplus accruing in the County School Fund over and above the amounts to be paid thereout”—

means excess of the fund after charging the same with the School and incidental operating and other expenses accrued, chargeable as of the end of the fiscal year, June 30th, and crediting the same with tax collections creditable to the Fund received prior to June 30th, or receivable after June 30th, which are a part of the previous fiscal year tax collection, except, however, the Comptroller is authorized to pay expenses for the collection, etc., of this one cent gasoline tax before separating the one-half of one per cent allotments to the two separate purposes—the School Fund and General Revenue Fund—one-half to each.

Considering the matter in the light of the foregoing, my advice concerning your duties in the premises is to ask the Governor for explanation of his letter of June 26th, submitting in your request the analysis aforesaid.

If you follow my suggestion of writing the Governor as aforesaid, I recommend that at the same time you call to his attention the following:

Section 13 of Article XII of our State Constitution provides:

“No law shall be enacted authorizing the diversion . . . of any County or District School Fund or the appropriation of any part of the permanent or available School Fund to any other than School purposes.”

I would also bring to his attention Sections 4, 5, and 9 of the same Article, all of which are constitutional provisions relating to the County and State School Fund.

GASOLINE TAXES

February 6, 1942.—042-55.

FEDERAL FUNDS—EXEMPTION

QUESTION: May funds furnished by the federal government for vocational training of defense workers be exempted from the State tax on gasoline when such gasoline is purchased for use in such defense training school?

In what manner may exemption from payment of State gasoline tax be obtained by such defense training school, since if the regulations and policies of the United States Office of Education are not complied with, (one such regulation being that funds for vocational training of defense workers cannot be used for the payment of a state gasoline tax) the plan for the vocational training of defense workers in Florida becomes subject to cancellation?

Hon. Colin English, State Superintendent of Public Instruction:

You have been advised on two separate occasions by federal authorities that funds furnished by the federal government for vocational training of defense workers cannot be expended for any type of state sales tax. This position is consistent with the immunity of the federal government in its sovereign capacity from taxation by the state.

The funds for vocational training of defense workers are furnished exclusively by the federal government pursuant to the federal appro-

TAXATION AND FINANCE—Gasoline Taxes

priation act of January 1, 1941 (P.L. 146). Although the state superintendent of public instruction acts as the agent of the federal government for the administration of the plan for the vocational training of defense workers, strict federal control is maintained over the plan and the funds provided. Monthly budgets must be submitted to the federal officials for approval, and monthly financial reports must be rendered on federal forms. The appointment of personnel is subject to the approval of federal officials, and the operation of the plan is subject to inspection by federal officials at all times. Although the funds are deposited with the state treasurer, who acts as the disbursing officer for the sake of expediency in administration, they remain, in effect, federal funds. All interest earned on any such funds must be accounted for to the federal government, and all undisbursed funds must be returned. Warrants drawn on such funds clearly state that they are funds of the United States Government.

Agencies of the federal government are already exempted from payment of state gasoline tax by virtue of the recognition by the state comptroller of a certificate executed by a federal official or employee on Form No. 1094. I suggest that a similar form for exemption from the state gasoline tax, meeting the approval of the state comptroller, be designed for the use of the purchase of gasoline to be used in connection with the vocational training of defense workers, as described above. A similar form can also be used to obtain exemption from payment of the federal tax on gasoline.

GASOLINE TAXES

October 23, 1942.—042-497.

ROAD DEPARTMENT—7-CENT GASOLINE TAX—LIABILITY FOR PAYMENT

QUESTION: Is the State Road Department required by state law to pay the 7¢ gasoline tax in its purchases of gasoline in order to carry on the work of completing the construction of State Road 4-A, Florida Mainland to Key West?

To State Road Department, Tallahassee, Florida:

The gasoline tax referred to is an excise tax on the privilege of selling gasoline exacted from the dealer, even though ultimately paid by the purchaser by reason of increase in price of gasoline occasioned by dealers adding the tax to the price of such gasoline. *Orange State Motor Oil Company vs. Amos*, 100 Fla. 884, 130 So. 707.

The language of the gasoline tax laws is quite explicit as to who shall pay the tax therein imposed, and that it shall be paid upon "every gallon" of gasoline sold. There is no indication in said laws that it was intended by the Legislature that the tax should not be paid upon gasoline sold to State departments or governmental agencies, or that such departments should be relieved of paying any increase in the price of gasoline occasioned by the dealer adding the tax to the purchase price.

It is therefore my opinion that the State Road Department is not entitled to be relieved of paying the resulting increase in the price of gasoline where such increase is occasioned by the dealer adding the tax to said price, but on the contrary must pay the dealer's price even though it includes the 7¢ gasoline tax.

TAXATION AND FINANCE—Political Divisions
POLITICAL DIVISIONS

June 3, 1941.—041-307.

COUNTY BOARD OF PUBLIC INSTRUCTION—BANKRUPTCY

QUESTION: What steps should a county board of public instruction take to enter into bankruptcy, or otherwise to secure relief from obligations which are so excessive that even over a long period of years it would be impossible to retire the obligations in full and operate the schools?

To Hon. Colin English, State Superintendent of Public Instruction:

Under the Municipal Bankruptcy Act as amended in 1940 (11 U.S.C.A. Supplement, Sec. 401), provision is made for the following taxing agencies or instrumentalities to go into bankruptcy:

"Public-school districts or public school authorities organized or created for the purpose of constructing, maintaining, and operating public schools or public school facilities."

In the case of *Roberts v. Board of Public Instruction for Broward County, Florida*, 112 Federal 2d 459, decided last year, the Circuit Court of Appeals for the Fifth Circuit specifically held that the Board of Public Instruction for Broward County came within the language quoted above from the Bankruptcy Act, and hence was entitled to relief under that Act. That Court said in the opinion with respect to the Board of Public Instruction for Broward County:

"In none of the acts is the Board of Public Instruction referred to as a political subdivision of the State of Florida. It is constituted to be and is operated as a school authority for the purpose of instructing, maintaining and operating public schools and public school facilities, and in doing these things, it is authorized to incur debts, funded and otherwise, and it has done so.

"In name and in plight, it comes directly within, both the remedial purpose and the precise terms of the statute it invokes. Nor is there any constitutional objection in the way of its obtaining the relief it asks. As the invoked statute is now drawn, to permit the voluntary as opposed to the involuntary, adjustment and re-arrangement, by composition, of the indebtednesses of school districts, school authorities, municipalities and other taxing districts, it has been finally and sweepingly held to be, valid and enforceable."

The Court further said:

"The act does indeed provide in Section 403, sub-section c, Title 11, U.S.C.A., that in the carrying out of the plan the order of the court putting it into effect shall not interfere with (a) any of the political or governmental powers of the petitioner, or (b) any of the property or revenues of the petitioner necessary for essential governmental purposes. But this provision only emphasizes that the fact that a petitioner may have and exercise political or governmental powers, does not at all prevent it from applying for relief by composition."

The Bankruptcy Act provides in detail the procedure to be followed by the taxing agencies or instrumentalities, like boards of public instruction, coming within the provisions of the Act. A petition may be filed by such agency or instrumentality, stating that the petitioner is insolvent or unable to meet its debts as they mature, and that it desires to effect a plan for the composition of its debts (11 U.S.C.A. Supplement, Section 403). This petition should be filed with the Federal District

TAXATION AND FINANCE—Political Divisions

Court in whose territorial jurisdiction the petitioner is located. The petition, accompanied by a filing fee of \$100.00, should state that a plan of composition has been prepared, is filed and submitted with the petition, and that creditors of the petitioner owning not less than fifty per cent of the securities affected by the plan have accepted it in writing. A list of the petitioner's creditors should be filed with the petition.

The above is merely an outline of the procedure to be taken by a county board of public instruction when it determines it is insolvent or unable to meet its debts, and desires to effect a plan for the composition of its debts. Before the actual steps are taken, of course, reference should be made to the more detailed procedure which is described in the Municipal Bankruptcy Act, and in the Bankruptcy Rules.

STATE BUDGET COMMISSION

December 31, 1941.—041-700.

EXPENSE BUDGETS—APPROVAL

QUESTION: Does the State Budget Commission have the authority to approve certain items set out in the expense budget? (Letter from Honorable F. C. Elliot, Secretary to Budget Commission elaborates on this request as answered below.)

To Hon. F. C. Elliot, Secretary to Budget Commission:

The recommendations contained in the departmental expense budget, required under the law to be filed with the Budget Commission on or before July 1st following the Legislative session, do not have any relationship to the amount of salary to be paid the officers and employees of the particular department. These expense reports are merely for the purpose of disclosing the departmental conformity to Legislative appropriation, but the report of the various departments to the Budget Commission, preceding the Budget Commission's recommendation to the Legislature, does have to do with the determination of certain salary amounts where the departmental report to the Budget Commission and the Budget Commission report to the Legislature undertake to specify salary amounts and where the Legislature appropriates in conformity therewith.

A finding by the Budget Commission that the Legislative appropriations for a department are ample to meet the recommendation to the Budget Commission from the department and recommendation from the Budget Commission to the Legislature; and a further finding by the Budget Commission that there is concurrence between these reports and this appropriation with respect to such officer or employee's particular salary, or in total amount so as to embrace such officer or employee's particular salary and such finding reported by the Budget Commission to the Comptroller, constitutes the necessary predicate upon which to determine the amount of the particular officer or employee's salary involved.

(1) Salary of President of the Agricultural and Mechanical College for Negroes.

Your letter of July 22nd above referred to does disclose that the \$128,154 appropriated by the Legislature is in conformity with the total amount requested of the Budget Commission for salaries to be paid to the State officers and employees in that institution for the biennium, and does disclose that among such recommendations is an item of \$4200 per annum for the President.

In my opinion, by these disclosures a proper case is made in this instance for the payment of the \$4200 per annum salary in lieu of the \$3600 per annum salary which Chapter 15859, Laws of 1933, specifies.

TAXATION AND FINANCE—State Budget Commission**(2) Florida State Hospital, Salary of Superintendent.**

Your letter of July 22nd above referred to discloses that the \$621,752.80 appropriated by the Legislature is in conformity with the total amount requested of the Budget Commission for salaries to be paid in the Institution for the biennium, which embraces a budgeted recommendation of \$5000 as the annual salary of its Superintendent. This \$5000 would therefore be the proper salary for the 1941-42 biennium for the Superintendent of this Institution.

(3) Florida Industrial School for Girls, Salary of Superintendent.

Your letter of July 22nd above referred to discloses that the \$24,000 appropriated by the Legislature is in conformity with the total amount requested of the Budget Commission for salaries to be paid in this Institution, and that \$2400 recommended by the Commission for the salary of the Institution's Superintendent is embraced in this appropriation. This \$2400 would be the proper salary for the Superintendent of this Institution for the 1941-42 biennium.

(4) Military Department of Florida, Salary of Adjutant General.

Your letter of July 22nd above referred to discloses that \$43,000 was appropriated by the 1941 Legislature for each year of the following biennium for salaries in this Department, and that the salary requested of the Budget Commission annually for the Adjutant General for such biennium is \$5000, which sum is covered by and included in the appropriation.

In my opinion the proper salary of the Adjutant General, therefore, for the biennium 1941-42 as prescribed by the 1941 Legislature, is \$5000 per annum. (This salary ceases upon incumbent becoming a Federal or Federalized State official.)

(5) State Library Board, Salary of Secretary and State Librarian.

The question of the amount of salary payable to the State Librarian, who is also Secretary to the State Library Board, for the biennium, 1941-42, has heretofore been passed upon by me, and a letter written regarding same under date of October 21, 1941, giving my opinion with reference thereto.

(6) State Board of Health, Salary of State Health Officer.

Your letter of July 22nd above referred to shows a relationship of Legislative appropriation for salaries to budgeted requests therefor, of the State Health Board officers, which does not warrant any departure from the salary prescribed by Chapter 15858, Laws of 1933, to-wit: the sum of \$4000 annually for the State Health Officer, from State sources. In determining what amount should be payable in salary annually to our State Health Officer from Federal funds, I will have to have further information from you regarding this subject, and would like to discuss same before expressing any definite opinion with reference thereto.

(7) State Marketing Bureau, Salary of Commissioner.

Your letter of July 22nd above referred to, discloses that the sum of \$35,820 was appropriated by the 1941 Legislature for salaries in this Bureau, which amount is in conformity with the total salary requests made by the Bureau of the Budget Commission for the biennium, and that the specifications in such budget request for the Commissioner is \$4200 annually. I am of the opinion, therefore, that this amount, \$4200, is the proper salary amount payable to the Commissioner for the regular 1941-42 biennium.

CHAPTER XII

EDUCATION

STATE PLAN

July 15, 1941.—041-381.

MARRIED WOMEN—HIGH SCHOOL ATTENDANCE

QUESTION: Under the Statutes of Florida may a girl who is married attend High School?

Hon. Colin English, State Superintendent of Public Instruction:

Section 216 of the Florida School Code (Chapter 19355, Acts of 1939) provides in part:

"Elementary and High Schools.—Public education in grades one to twelve, inclusive, shall be made available at public expense for a minimum term of eight months each year to all persons from six to twenty-one years of age, inclusive, and to such other persons residing in the State as may be declared by regulations of the State Board to be eligible for work in these grades."

I find no provision of law that would deprive a girl of her right to attend such grades when she is not over the age of twenty-one years merely on the ground that she is married.

STATE AGENCIES

February 10, 1941.—041-60.

BOARD OF EDUCATION—ADMINISTRATION OF SCHOOL FUND

QUESTION: Holmes County Board of Public Instruction 6½% school warrants in the sum of \$13,000 are to be compromised in accordance with a resolution of the Board of County Commissioners and the Board of Public Instruction of Holmes County. Is such an arrangement legal?

To Hon. Colin English, State Superintendent of Public Instruction:

It is my opinion that the arrangement set forth is legal.

Section 308 of the School Code (Section 892 (48), Compiled General Laws, 1940 Supplement) provides that it shall be the duty of the State Board of Education to "provide for the proper administration of the State permanent school fund established by Section 4 of Article XII of the Constitution so that the principal shall remain sacred and inviolate, as required by Section 5 of Article XII of the Constitution."

Since this arrangement constitutes merely a compromise of a part of the interest due on the time warrants, it seems a proper exercise of the power of the Board to administer that fund.

STATE AGENCIES

February 20, 1942.—042-94.

BOARD OF EDUCATION—INVESTMENT OF PROCEEDS OF SCHOOL CONSTRUCTION BOND SALES

QUESTION: (1) Bonds in the amount of \$2,250,000 for construction have been issued and sold by one special tax school district and

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\$290,000 of bonds for a similar purpose by another district, but construction is now impossible because of inability to obtain materials as a result of priority rulings of the federal government. Inasmuch as the present war may postpone such construction for several years, may the funds realized from the sale of all of the bonds in these two districts be invested in other interest bearing securities?

(2) Should taxes levied and collected for debt service, levied on both homestead and non-exempt property be used to pay the following obligations:

(1) Tax anticipation warrants issued and sold to the State Board of Education to satisfy judgments which the tax was originally levied to pay.

(2) A debt created by the purchase of a building to be used and now being used for school purposes.

To Hon. Colin English, State Superintendent of Public Instruction:

(1) Specifically, you ask whether these funds may be invested in:

(1) Government securities.

(2) Bonds of special tax school districts in the same county.

(3) School funding warrants issued under Section 1086 of the School Code by the county school board of the same county.

(4) Notes issued under Section 1085 of the School Code in financing the purchase of school property by the county school board of the same county.

Section 1049 of the School Code provides:

"The proceeds derived from the sale of said bonds shall be held by the County Board and shall be expended by the said Board for the purpose for which said bonds were authorized for said school district, and shall be held and expended in the manner following:

"(1) The County Board shall deposit, or cause to be deposited, the proceeds arising from the sale of bonds, together with the interest and sinking fund collected for said bonds in any bank or banks of the district issuing bonds that have been designated as county school depositories as prescribed in Section 1090, Article 12 of Chapter X of the School Code, provided the bank or banks designated as depositories shall give the County Board an adequate surety bond or securities, as prescribed, for protection of said deposits. . . ."

This provision makes clear that the proceeds from the sale of construction bonds cannot be used for any purpose other than construction, so the funds must be preserved until such time as construction can take place.

The provision requiring such funds to be deposited in a bank approved as a depository for school funds is designed, in my opinion, for the protection of the funds temporarily and the maintenance of their liquidity, normally a short period, pending the realization of the purposes of the bond issue. Apparently the Legislature in enacting this provision did not contemplate the situation which has now arisen because of the war emergency. This statute should not, therefore, be construed so as to govern the deposit of such funds at a very low rate of interest for a long period, perhaps several years, because of present impossibility of executing the project for which the bonds were issued, while the school districts involved must continue to pay to the bondholders a much higher rate of interest. Such would not be consistent with a sound public policy which requires meticulous conservation of public funds.

EDUCATION—State Agencies

The interpretation that Section 1049 of the School Code does not cover the present situation is in harmony with Section 104 of the School Code, which provides:

"The provisions of the Florida School Code shall be liberally construed to the end that its objects may be effected and public education may be promoted throughout the State."

Section 1049 of the School Code does not, in my opinion, contemplate the preservation of the proceeds of bond sales, under the conditions above described, only by deposit in approved banks. Accordingly, it would be proper and desirable for the State Board of Education to adopt rules under its rule-making power, as set forth under Section 306 and 307, and as contemplated by Section 308 (23) of the School Code, regulating the investment of funds in such a contingency.

My answer to your question regarding the investments of the bond proceeds is, therefore, that such investment may be made only in such securities as are approved by a regulation of the State Board of Education. The principle applies, however, only if and when emergency conditions, such as the present, exist and have been so declared by the State Superintendent of Public Instruction, to the end that public education may thereby be promoted in the county concerned.

I would suggest that the State Board of Education, in formulating a regulation to govern this matter, consider the desirability of restricting the investment of bond proceeds in district bonds and obligations to only the bonds and obligations of the district making the investment.

(2) Taxes collected under a levy, generally, for "debt service" may be used to pay only such obligations for which the property on which the tax is levied is liable to taxation.

Accordingly, my opinion is that the proceeds of the tax you describe could be used to pay tax anticipation warrants if they are obligations originally incurred before the adoption of Article X, Section 7, of the Florida Constitution, so that both homestead and non-exempt property are subject to taxation for such obligations.

As to the debt created by the purchase of the building, however, I understand that such obligation was incurred since the adoption of Article X, Section 7, of the Florida Constitution. Therefore, my opinion is that the taxes collected under the above described levy cannot be used to pay such debt.

STATE AGENCIES

June 21, 1941.—041-340.

**BOARD OF EDUCATION—PURCHASE OF INSTRUCTION WARRANTS
—DADE COUNTY**

QUESTION: May the State School Fund be legally invested in warrants in the amount of approximately \$300,000 to be issued by the Dade County Board of Public Instruction under Section 1086, of Chapter 19355, Acts of 1939?

To Hon. Colin English, State Superintendent of Public Instruction:

I have examined the resolutions of the Dade County Board of Public Instruction adopted March 17, 1941, and May 31, 1941, together with other relevant papers submitted, and in my opinion these resolutions sufficiently comply with the requirements of Section 1086 relating to the retirement of existing indebtedness which is unfunded or in default.

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In rendering this opinion I am assuming that a detailed plan has been submitted to the State Superintendent and approved by him showing the funds needed for operating the schools in Dade County on the most economic basis practicable, the amount of any other obligations which must be met each year, the total funds available each year for the entire school program, and the funds that can be reasonably spared for the retirement of indebtedness without needlessly handicapping the school program and which can be budgeted each year for the retirement of such indebtedness, and that the proposal stated in the resolutions is in accordance with such plan, to the end that the interest bearing coupon warrants can be paid without needlessly handicapping the school program and that the funds therefor can be budgeted each year.

As I have pointed out in previous opinions, the State Board of Education is charged by the Constitution and laws of this State with the responsibility of providing for the proper administration of the State School Fund so that the principle shall remain sacred and inviolate. In rendering this opinion, therefore, I am not passing upon the question of the soundness, from a business standpoint, of this investment.

STATE AGENCIES

February 27, 1941.—041-88.

BOARD OF EDUCATION—PURCHASE OF JUDGMENT—UNION COUNTY

QUESTION: May the State Board of Education purchase a judgment against the Board of Public Instruction of Union County on certain defaulted time warrants in the light of an opinion of the Attorney General's Office dated October 17, 1940, on this same subject?

To Hon. Colin English, State Superintendent of Public Instruction:

The opinion referred to was in the form of a memorandum to the effect that the question of whether the State Board of Education should invest in this judgment was a question of policy to be determined by the Board. In the last paragraph of the memorandum, the case of Board of Public Instruction for Bradford County vs. Gibbs, 143 Fla. 717, 197 So. 443, was cited as indicating that a judgment based on bonds is something different from the bonds themselves so far as the authority to invest the same is concerned, but it was admitted in the memorandum that this case "would really have no direct bearing on the determination of this matter."

I have read the Bradford County case, and in my judgment it is not in point here. The Court merely stated that a statute authorizing the purchase of bonds by a county board of public instruction does not thereby authorize the purchase of judgments on bonds. This question is not present in determining the power of the State Board of Education to purchase a judgment, because there is no restriction in the statutes or Constitution regarding the investment of the State School Fund other than that the principal shall remain inviolate.

Article XII, Section 3 of the Florida Constitution, provides that the State Board of Education "shall have the management and investment of all State school funds under such regulations as may be prescribed by law . . ." while Section 5 of the same Article provides:

"The principal of the State School Fund shall remain sacred and inviolate."

Section 308 of the School Code places upon the State Board of Education the responsibility to exercise the power and duty to "provide

EDUCATION—State Agencies

for the proper administration of the State Permanent School Fund established by Section 4 of Article XII of the Constitution, so that the principal shall remain sacred and inviolate, as required by Section 5 of Article XII of the Constitution."

So far as the power of the State Board of Education to invest in the judgment of the Union County Board of Public Instruction is concerned, it is my opinion that the State Board has this power, if in making the purchase the principal of the State School Fund remains "sacred and inviolate."

In rendering this opinion, I am not passing upon the question as to whether the purchase of this judgment will constitute a sound investment.

P. S.—If in making such a purchase you do so with agreement that you cannot resell the judgment bought for less than some specified figure, thereby depriving yourself of the full rights of ownership, in my opinion you are employing school funds in a manner that does not preserve them sacred and inviolate.

I would never purchase a judgment of this character unless I had reason to believe and almost be certain its value would remain in excess of the cost.

STATE AGENCIES

February 20, 1941.—041-77.

BOARD OF EDUCATION—PURCHASE OF TAX ANTICIPATION NOTES FOR INVESTMENT

QUESTION: Is it permissible under the statutes for the State Board of Education to purchase Board of Public Instruction tax anticipation notes as an investment for the State Permanent School Fund?

To Hon. Colin English, State Superintendent of Public Instruction:

Article XII, Section 3 of the Florida Constitution, provides that the State Board of Education "shall have the management and investment of all State school funds under such regulations as may be prescribed by law . . ."

Section 308 of the School Code provides that it shall be the responsibility of the State Board of Education to exercise the power and perform the duty to "provide for the proper administration of the State School Fund established by Section 4 of Article XII of the Constitution, so that the principal shall remain sacred and inviolate, as required by Section 5 of Article XII of the Constitution."

I have been unable to find any statute which restricts the power of the Board as to proper investments of the State Permanent School Fund.

Therefore the State Board of Education has the power under the statute and Constitution to purchase Board of Public Instruction tax anticipation notes, as an investment for the State Permanent School Fund. In making this ruling, of course, I assume that the notes in question are valid obligations and sound investments, questions which have not been presented to me for determination.

COUNTY SCHOOL SYSTEM

February 4, 1942.—042-61.

BOARD OF PUBLIC INSTRUCTION—APPOINTMENTS TO VACANCY

QUESTION: Is a person appointed to a vacancy on a county school board to serve for the unexpired term of the person who was previously serving on the board, or to serve only until the next general election?

EDUCATION—County School System

To Hon. Colin English, State Superintendent of Public Instruction:

Section 419 of the School Code provides that "all vacancies on the County Board shall be filled by appointment by the Governor," but the tenure of the person so appointed is not specified.

It is the well settled general policy of the law that all vacancies in elective offices shall be filled by an election as soon as practicable after the vacancy occurs. (46 C. J. 977.) This policy is recognized by the Florida Constitution in Article XVIII, Section 6, which provides:

"The term of office for all appointees to fill vacancies in any of the elective offices under this Constitution, shall extend only to the election and qualification of a successor at the ensuing general election."

Article IV, Section 7, of the Florida Constitution is not applicable, (See Advisory Opinion to Governor, 25 Fla. 426, 5 So. 613, 1889; State vs. Taylor, 108 Fla. 541, 146, So. 549, 1933.) It provides:

"When any office, from any cause, shall become vacant, and no mode is provided by this Constitution or by the laws of the State for filling such vacancy, the Governor shall have the power to fill such vacancy by granting a commission for the unexpired term."

It is not applicable for the reason that provision is made by law for filling such vacancy not only by Section 419 in the School Code, but by Section 464, Compiled General Laws, 1927, which provides:

"... if the office be a State, district, or county office (other than a member or officer of the Legislature), it shall be the duty of the Governor to fill such office by appointment, and the person so appointed shall be entitled to take and hold such office *until the same shall be filled by an election as provided by law . . .*" (Emphasis Supplied.)

This statute apparently contemplates the election of a successor at the next general election as provided by law if a vacancy occurs in any of the offices mentioned. Obviously, the office of member of the county school board is a "county office."

Section 9, of Article XVIII, of the Florida Constitution provides:

"A general election shall be held in each county in this State on the first Tuesday after the first Monday in November, A. D. 1898, and every two years thereafter, for all elective State and County officers, whose terms of office are about to expire, *or for any elective office that shall have become vacant.*" (Emphasis Supplied.)

This provision indicates that if a vacancy has occurred in an elective office such vacancy shall be filled at the general election. (Advisory Opinion to the Governor, *supra*.)

It is my opinion, therefore, that in view of the above constitutional and statutory provisions, together with the general policy of the law, consistent with the principles of a representative form of government, a person appointed to a vacancy on a county school board shall serve only until the next general election or until the end of the unexpired term, whichever is first in point of time.

COUNTY SCHOOL SYSTEM

March 30, 1942.—042-170.

BOARD OF PUBLIC INSTRUCTION—APPOINTMENT TO VACANCY

QUESTION: (1) Should the Governor's commission to an appointee to fill a vacancy on a county board of public instruction run for the full unexpired term of his predecessor?

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(2) Must candidates for the office upon the expiration of the commission of such appointee participate in the May primary election in order to have their names on the ballot in the general election next November?

To Hon. Spessard L. Holland, Governor:

(1) Your commission to such appointee should run only until the next general election. Article XVIII, Section 6, of the Florida Constitution provides:

"The term of office for all appointees to fill vacancies in any of the elective offices under this Constitution, shall extend only to the election and qualification of a successor at the ensuing general election."

Section 9 of Article XVIII, provides:

"A general election shall be held in each county in this State on the first Tuesday after the first Monday in November, A. D. 1898, and every two years thereafter, for all elective State and County officers, whose terms of office are about to expire, or for any elective office that shall have become vacant." (Emphasis supplied.)

Section 464, Compiled General Laws, 1927, provides:

"... if the office be a State, district or county office (other than a member or officer of the Legislature), it shall be the duty of the Governor to fill such office by appointment, and the person so appointed shall be entitled to take and hold such office until the same shall be filled by an election as provided by law . . ." (Emphasis Supplied.)

The Supreme Court has not yet determined whether a member of a county school board is "any of the elective offices under this Constitution" as prescribed in Article XVIII, Section 6. Even if this provision should not apply to a member of a county school board, the other two provisions quoted above, that is, Section 9 of Article XVIII of the Florida Constitution and Section 464, Compiled General Laws, 1927, make clear that an appointment to a vacancy on a county school board should be only until the next general election, or until the end of the unexpired term, whichever is first in point of time.

(2) This question must be answered in the affirmative. Section 355, C.G.L., 1927 (as amended by Chapter 17900, Laws of Florida, 1937) provides that "the name of no person nominated by a party required hereunder to make nominations of candidates shall be placed upon the official ballot to be voted at any general election as a candidate for any office, when provision is made herein for nominating candidates for such office, unless such person shall have been nominated for such office under the provisions of" the primary election law.

COUNTY SCHOOL SYSTEM

January 9, 1942.—042-3.

BOARD OF PUBLIC INSTRUCTION—CANVASS OF SCHOOL BOARD ELECTIONS

QUESTION: In canvassing the results of a district school election, does the county school board have the power to act judicially and go behind the election returns for the purpose of determining whether the voters were properly qualified?

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To Hon. C. A. Boswell, Jr., Attorney for the Board of Public Instruction, Bartow, Florida:

The common law duties and powers of a canvassing board are:

To determine the genuineness of the election returns before them, and their functions and duties otherwise are purely ministerial. They have no other powers, functions or duties than those named by statute or in the Constitution. 20 C. J. 200.

It is a common error for an election canvassing board to overestimate its powers. These powers are limited unless increased by statute to the mechanical or mathematical functions of ascertaining and declaring the apparent result as shown on the face of the returns before them. Fraud, bribery, violence, or other matters affecting the regularity of elections are to be passed upon by the proper tribunal, and not by the board of canvassers. 20 C. J. 200.

The canvassers are to consider only the returns, and they have no power unless conferred by statute to go behind them. 20 C. J. 202.

The foregoing principles have been approved by the Supreme Court of Florida in the case of Franklin County vs. State, 3 So. 471. See also State vs. Board of County Canvassers of Alachua County, 17 Fla. 1.

In my opinion, questions regarding the qualification of voters who voted in a district school election in your election herein referred to, will have to be determined judicially. The testing of the question presented, relating to these qualifications, can, of course, be handled in proper quo warranto proceedings.

COUNTY SCHOOL SYSTEM

May 25, 1942.—042-256.

BOARD OF PUBLIC INSTRUCTION—COMPULSORY IMMUNIZATION OF SCHOOL CHILDREN

QUESTION: (1) Does a County Board of Public Instruction have the power to carry out a program of compulsory immunization for all school children against typhoid, small pox and diphtheria?

(2) Could such a program of compulsory immunization be enforced by considering the present war conditions as an emergency?

To Hon. Colin English, State Superintendent of Public Instruction:

(1) Section 423 (8) (f) of the School Code provides that "except in emergencies pupils may be given remedial and preventive treatment only on written consent of the parent." In my opinion this provision negatives any authority on the part of the county school board to carry out such a program as you describe.

You ask further, whether, if consent of a parent cannot be obtained against immunization against disease, his child could be excluded from school by the county school board in order to safeguard the health and welfare of other pupils.

In my opinion such action is not authorized inasmuch as it would be directly contrary to the statute mentioned above. Refusal of a parent to permit the immunization of his child against disease would seem to threaten the health and welfare of his child rather than the other pupils who are immunized.

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(2) In my opinion war conditions are not such an exigency as contemplated by the word "emergency" in the above section. In my opinion the word "emergency" in the statute is directed at two situations: (1) individual first aid cases; and (2) epidemics, in which case the school board should act in cooperation with the health officer as prescribed in Section 634 of the School Code, which action is to be in conformity with the rules and regulations prescribed by the State Board of Health regarding the control of communicable diseases.

COUNTY SCHOOL SYSTEM

December 2, 1941.—041-682.

BOARD OF PUBLIC INSTRUCTION—SCHOOL FUNDS—DEFRAYMENT OF FLORIDA EDUCATION ASSOCIATION EXPENSES

QUESTION: May County Board of Public Instruction use school funds to help defray expenses of meetings of the Florida Education Association?

To Hon. Colin English, State Superintendent of Public Instruction:

No power is given by the School Code to the county school board to use school funds for such a purpose. (See Section 423 (12) of the Florida School Code.)

Inasmuch as such meetings are designed for the improvement of instructional personnel, the use of school funds to defray expenses of the program of such meetings is a matter which would properly be a subject of regulation by the State Board of Education under its power to prescribe rules and regulations to aid in carrying out the purposes and objective of the School Code in accordance with Section 308 (20) of the Florida School Code.

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June 4, 1941.—041-309.

BOARD OF PUBLIC INSTRUCTION—DEFRAYMENT OF SUMMER SCHOOL EXPENSES OF TEACHER

QUESTION: (1) Is there any statutory authority for the County Board of Public Instruction of any county to make a payment or allowance to or for a teacher to help defray his expenses to summer school?

(2) If the answer to that question should be in the affirmative, can these arrangements be made for the teachers in one district where funds are available to permit the payment or where the payment is recommended by the trustees unless a similar arrangement is to be made for teachers in another district in the county?

(3) If it would not be possible for the County Board to make an advance payment, would it be possible under the law for this payment to be made after teachers have completed the summer school work and have begun their teaching duties for the year?

To Hon. Colin English, State Superintendent of Public Instruction:

I have been able to find no express statutory authority for a county board of public instruction to make a payment or allowance to a teacher to help defray his expenses at summer school, nor do I believe there is any implied statutory authority for such payment or allowance.

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As the Florida Supreme Court has pointed out in numerous cases, the Constitution of the State requires that all County School funds "shall be disbursed by the County Board of Public Instruction solely for the support and maintenance of public free schools." (Article XII, Section 9.)

In my opinion, a payment or allowance to a teacher to help defray his expenses at summer school cannot be considered a disbursement for the support and maintenance of the public free schools, and hence such disbursement will be without authority of law. Under this conclusion, such a disbursement would be equally unauthorized whether in the form of advance payment or a payment after the teachers have completed their summer school work and have begun their teaching duties for the year.

COUNTY SCHOOL SYSTEM

October 27, 1941.—041-624.

BOARD OF PUBLIC INSTRUCTION—EXPENDITURE OF FUNDS FOR CIVIC DENTAL CLINIC

QUESTION: A civic club has been maintaining a dental clinic in one of the county schools for under-privileged children and is now requesting the county board of public instruction to purchase some of the supplies for the use in such clinic and to pay a small amount toward the salary of the person who conducts the clinic. Can the county board of public instruction properly expend county school funds for such purpose?

To Hon. Colin English, State Superintendent of Public Instruction:

Section 423 (8) (f) of the Florida School Code provides that the county board of public instruction shall "provide for all children of school age in the county to have periodic physical and dental examinations and, insofar as practicable, to arrange and cooperate with other organizations for the prompt treatment of all pupils who are in need of remedial and preventive treatment: Provided, that except in emergencies pupils may be given remedial or preventive treatment only on written consent of the parent."

Section 433 (8) (f) of the School Code requires the county superintendent of public instruction to "recommend plans and supervise arrangements so that all children in the county may have periodic physical and dental examinations and to arrange, insofar as practicable, for prompt treatment of all pupils in need of remedial and preventive treatment: Provided that except in emergencies pupils may be given remedial or preventive treatment only on written consent of the parent."

Section 629 of the Florida School Code provides that "the State Board of Education and the State Board of Health shall jointly prescribe uniform forms, rules and regulations, and, through their executive officers, shall arrange for the examination at appropriate intervals of each child attending the public schools of the State for the purpose of discovering, reporting, and promoting treatment of mental and physical defects that require medical or surgical treatment for the proper development of each child."

Section 631 of the Florida School Code requires the county school board to cooperate with the State Board of Education and the State Board of Health and where "adequate medical inspection service is not provided by county health authorities or by the State Board of Health, the County Board shall have the authority to employ one or more county school physicians or school nurses for that purpose."

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It seems clear from these provisions that the Legislature contemplated that the county school board should furnish medical and health services to the extent of (1) providing periodic physical and dental examinations and (2) arranging for the prompt treatment of all pupils found to be in need of remedial or preventive treatment and cooperating with other organizations to the same end. Such services are to be available for all children of school age and not just to a particular group of children. In view of these provisions and the fact that the maintenance of the health of the pupils is essential to the efficient operation of the schools, it is my opinion that a county board of public instruction is authorized to expend county school funds to support a dental clinic as long as the clinic is open to all pupils of school age within the attendance area.

In the particular instance you mention, I think the proper procedure would be for the dental clinic to be operated as a "school clinic" in cooperation with the civic club, rather than for the clinic to be operated by the civic club with certain of the expenses being borne by the county school board.

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February 10, 1942.—042-73.

BOARD OF PUBLIC INSTRUCTION—EXPENDITURE OF SCHOOL FUNDS

QUESTION: (1) Does the county school board have the authority to pay the salary or part of the salary of any person employed in the county who is not employed directly or indirectly by the county school board, unless such a person is employed in health work with the approval of the county school board?

(2) Does the county school board have the authority to purchase equipment such as motion picture machines which may be used by the county home demonstration agents, the county forester, or by any other such person not directly employed by the county school board?

To Hon. Colin English, State Superintendent of Public Instruction:

(1) Section 13 of Article XII of the Florida Constitution provides:

"No law shall be enacted authorizing the diversion or the lending of any County or District School Funds, or the appropriation of any part of the permanent or available school fund to any other than school purposes; . . ."

It is my opinion that this provision, as well as Section 423 of the School Code, which prescribes the powers and duties of the county school board, does not permit the use of any school funds to pay the salary or any part of the salary of any person who is not employed directly or indirectly by the county school board. Accordingly, I must answer this question in the negative.

(2) The constitutional provision and the section of the school code governing my answer to your first question are directly applicable to your second question. In my opinion, the county school board does not have authority to purchase equipment which is not to be used in the school system of the county.

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October 27, 1941.—041-625.

SCHOOL FUNDS—EXPENDITURE FOR VOCATIONAL EDUCATION

QUESTION: What are the requirements under the Constitution and Laws of Florida regarding the expenditure of county school funds for vocational rehabilitation?

To Hon. Colin English, State Superintendent of Public Instruction:

Section 423 (6) (1) of the Florida School Code requires the county school board to provide for the establishment and maintenance of rehabilitation services for the physically handicapped, consistent with Federal laws. Under Section 1021 of the Florida School Code, consent is given to the Act of Congress approved June 2, 1920, as amended June 5, 1924, whereby certain Federal funds are accepted for the promotion of vocational rehabilitation.

Article XII, Section 13, of the Florida Constitution prohibits the use of county or district school funds for other than "school purposes." "School purposes" undoubtedly means "educational purposes." A liberal interpretation should be applied to these words, in view of the objectives of the public school system of the State as outlined by the Supreme Court: "The purpose intended to be accomplished in establishing and liberally maintaining a uniform system of public free schools, is to advance and maintain proper standards of enlightened citizenship." (State vs. Henderson, 137 Fla. 666, 188 So. 351, 1939.)

My opinion is that the constitutional provision above recited requires that all expenditures for vocational rehabilitation under the above statute must be primarily educational in character, and should be made only in conformity with the regulations prescribed by the State Board of Education for such vocational rehabilitation.

COUNTY SCHOOL SYSTEM

February 26, 1941.—041-86.

SCHOOL FUNDS—TRANSPORTATION OF PUPILS

QUESTION: Does the allowance of gasoline money to a group of high school boys in Lakeport to permit them to come to basketball practice constitute a legal expenditure of school funds?

To Hon. Colin English, State Superintendent of Public Instruction:

Section 423 (10) of the School Code places upon the county board of public instruction the power and duty to "make provision for the transportation of pupils to the public schools or school activities they are required or expected to attend . . ." The furnishing of such transportation would, of course, be subject to Section 801 of the School Code, which provides that no State funds shall be paid for the transportation of pupils whose homes are within two miles from the nearest appropriate school except upon specific ruling by the State Board of Education.

Assuming that the nearest appropriate school in the present case is in Moore Haven, the answer to your question depends upon whether the basketball practice mentioned is a school activity which the Lakeport High School boys were required or expected to attend. If they are so required or expected, this will be a legal expenditure of school funds; otherwise it will not be a legal expenditure, because there is no authority for a school board to pay for the transportation of pupils to and from

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schools or school activities in the absence of express statutory authorization therefor.

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April 7, 1942.—042-160.

TENURE LAWS—EFFECT OF SCHOOL CODE

QUESTION: Does Section 535 of the Florida School Code, as amended by Chapter 20970, Acts of 1941, repeal or in any way interfere with the operation of local teacher tenure laws in counties in which such laws are in operation?

To Hon. Colin English, State Superintendent of Public Instruction:

The local teacher tenure laws which are in effect in this state are Chapter 18137, Chapter 18743 and Chapter 18964, Laws of Florida, 1937, Chapter 19804, Laws of Florida, 1939, and Chapter 21197, Laws of Florida, 1941. In my opinion these laws were not repealed or affected by the enactment of Section 4, Chapter 20970, Laws of Florida, 1941, which amended Section 535 of the School Code relating to the method of reappointing teachers and of filling vacancies. Neither are such laws repealed by Section 15, Chapter 20970, Laws of Florida, 1941, which repeals all laws "in conflict with" the provisions of this chapter. There is no conflict between Section 535 of the School Code as amended and the local teacher tenure laws. Teacher tenure laws simply go a step farther than Section 535 of the School Code and provide for and protect continuity of service.

COUNTY SCHOOL SYSTEM

October 22, 1941.—041-637.

BOARD OF PUBLIC INSTRUCTION—IMPROVEMENT OF SCHOOL SITE

QUESTION: (1) Could a county board of public instruction spend public funds for improving a school site or erecting a building on a school site upon which there is a mortgage outstanding, when the site has been purchased prior to July 1, 1939, the effective date of the Florida School Code?

(2) Could such improvements take place where there is an outstanding mortgage against the property if the site has been purchased on, or after, July 1, 1939 and the plan for purchasing the site has been approved by the State Board of Education in accordance with the provisions of Section 1085 of the Florida School Code?

To Hon. Colin English, State Superintendent of Public Instruction:

(1) There was no power vested in a county board of public instruction during the period mentioned to give a mortgage on any land purchased for a school site. Such land could be procured only in conformity to Section 509, Compiled General Laws 1927, and this section provided that the debt for the purchase price was a charge or lien only upon the school funds of the county or special tax district (*Langford vs. Odum*, 77 Fla. 282, 81 So. 469, 1919). Accordingly, some evidence of indebtedness or security other than a mortgage on the specific property purchased should be issued to the vendor. Although such mortgage is invalid, the land would, in such a case, ordinarily be subject to an equitable lien for the purchase price (*Special District No. 1 vs. Hillman*, 131 Fla. 725, 179 So. 805, 1938).

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Section 561, Compiled General Laws 1927, directed county school boards "to do whatever is necessary with regard to . . . constructing, repairing, furnishing, warming, ventilating, keeping in order or improving the schoolhouses . . ." That the land purchased by the county school board may be subject to an equitable lien would not be an obstacle to the board's fulfilling its duties under this section. My opinion is, therefore, that your first question should be answered in the affirmative.

(2) Obligations created and approved under Section 1085 of the Florida School Code become obligations against the county current school fund or the district current school fund, as the case may be, and no provision is made for such obligations creating a lien on the property so purchased. This section contemplates that any evidence of indebtedness issued to the vendor be not in such form as to purport to be secured by a lien or mortgage on the specific property purchased. Accordingly, any mortgage executed in connection with the purchase of a school site under Section 1085 is without effect.

A duty is imposed upon the county school board by Section 423 (11) of the School Code to improve school sites. In my opinion there is no legal obstacle to the improvement of a school site under the conditions enumerated in your second question. I wish to call your attention, however, to the limitation on indebtedness in Section 1085 (2) of the School Code.

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July 8, 1941.—041-362.

BOARD OF PUBLIC INSTRUCTION—ISSUANCE OF CONTINUOUS CONTRACT TO INSTRUCTIONAL PERSONNEL

QUESTION: Is a contract by a Board of Public Instruction legal when it contains the following continuous clause:

"BE IT RESOLVED That the policy of the Board of Public Instruction is, and shall be, that all employment of the instructional personnel shall continue indefinitely until the same is terminated for a reason deemed sufficient by the Superintendent after a hearing before and with the approval of the Board of Public Instruction, and that this resolution shall be deemed a part of every contract."

To Hon. Colin English, State Superintendent of Public Instruction:

Such a resolution in my opinion may be proper as a statement of the policy of the County Board of Public Instruction adopting it, provided the language at its conclusion—"and that this resolution shall be deemed a part of every contract"—be eliminated therefrom. But such resolution cannot be enforceable either against the adopting board or its successors. Sections 423, 433 and 443 of the School Code (Chapter 19355, Acts of 1939) provide that the Trustees of the School Districts shall consider the recommendations of the District Supervising Principal or the Principals of the schools in the District and the County Superintendent regarding the nomination of members of the instructional staff and that the Board of Public Instruction shall act on the nomination by the Trustees of those members. The procedure laid down in these statutory provisions cannot be modified by a resolution or contract of the Board of Public Instruction.

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September 4, 1941.—041-499.

**BOARD OF PUBLIC INSTRUCTION—RESOLUTION RELATING TO
ISSUANCE OF CONTINUOUS CONTRACT TO INSTRUCTIONAL
PERSONNEL**

(Supplement to Opinion dated July 8, 1941; 041-362)

To Hon. Colin English, State Superintendent of Public Instruction:

In your letter of July 7, 1941, requesting the above opinion you referred only to a resolution adopted by the County Board, but state you should have called attention also to the fact that the Trustees in each of the Districts of the County in question had adopted a similar resolution and that the policy therefore was being carried out by mutual agreement between the Trustees and the County Board.

By having the Trustees of the School Districts adopt the resolution of course an objection to this procedure is obviated. Although a statement of policy contained in a resolution adopted by both the County Board of Public Instruction and the Trustees of the Districts may not be legally enforceable if the matter were before the Courts, I commend highly statements of policy of this kind and believe that they will be most valuable in the stabilization of the employment of teachers and will be productive of better relations between the instructional personnel and the school authorities.

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May 3, 1941.—041-242.

BOARD OF PUBLIC INSTRUCTION—MEMBERS—COMPENSATION

QUESTION: Is Chapter 19338, Acts of 1939, applicable to Hardee County?

To Hon. Colin English, State Superintendent of Public Instruction:

Chapter 19338, Acts of 1939, does apply to Hardee County since the population of this County, under the last State Census (1935), was 11,414 and, under the last Federal Census (1940), was 10,158, and since the Act itself is by its expressed terms made applicable to counties having a population between 9,900 and 10,900, according to the last State or Federal Census.

The population of Hardee County, according to the 1935 State Census, was 11,414, and, if we judge its application to this 1939 Act according to that population which is the last State Census, it would not be subject to the law, but since its population in 1940, which is the last Federal Census and the figure being 10,158, is within the population classification of the Act inquired about, I hold that, in point of population involved, the 1939 Act is applicable to Hardee County.

There is this distinction, however, which in my opinion, makes the law in question unconstitutional and inapplicable, for that reason, to Hardee County:

The Florida Supreme Court has many times held that the compensation of county officers may not be subject to a local Act. This being the law, the Chapter which you inquire about can only be constitutionally valid as a general act, because it does attempt to fix the compensation of county officers.

The Florida Supreme Court, with hardly any exceptions, has held as invalid local acts all such local population acts within a narrow range of population classification, such as that set forth in Chapter 19338.

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I am, therefore, constrained to hold that, in my opinion, while you can properly from the standpoint of population judge the Act in its application to Hardee County, by the 1940 Federal Census, which gives to this County 10,158 population, and this population is within the population classification of the Act in question, this Act is not a law applicable to Hardee County, because I regard the Act as unconstitutional, for the reason that it is a local law and as such attempts to fix the compensation of county officers.

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November 17, 1941.—041-649.

BOARD OF PUBLIC INSTRUCTION—MEMBERS—LIABILITY FOR INJURIES CAUSED BY SCHOOL BUS TRANSPORTING DEFENSE UNITS

QUESTION: Would county school board members be individually liable in the event of an accident occurring to a county owned school bus while Florida defense units were being transported, if the accident involved bodily injury or death, and if the insurance policies were not written to cover such extra school use of the equipment?

To Hon. Colin English, State Superintendent of Public Instruction:

Pursuant to its power, under Section 307 (2) of the Florida School Code, to adopt rules and regulations, the State Board of Education, on October 28, 1941, adopted the following rule:

"Each county school board upon request of the county defense council and upon recommendation of the county superintendent, shall be authorized to make such use of transportation equipment owned by the county school system as will in their opinion further the program of National Defense, provided that extra-school use of transportation units shall not interfere with regularly scheduled school services."

Section 306 of the School Code provides that all rules and regulations adopted by the State Board of Education in carrying out the provisions of the School Code shall, if not in conflict therewith, "have the full force and effect of law."

Since the above rule, therefore, has the effect of law, "as long as the county school board is acting in conformity to such rule there could be no individual liability on the part of any county school board member.

While Section 803 of the School Code permits the county school board to carry liability insurance covering injuries to property and to persons other than pupils, it only requires the board to carry liability insurance covering pupils legally enrolled in the public schools. Therefore, the lack of any liability insurance covering persons other than legally enrolled pupils would not subject a board member to individual liability.

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March 18, 1941.—041-143.

BOARD OF PUBLIC INSTRUCTION—MEMBERS—MILEAGE

QUESTION: Are members of the Board of Public Instruction, whose compensation is governed by local laws which do not mention mileage, entitled to mileage to and from the County Courthouse in accordance with Chapter 5656, Acts of 1907, and does an opinion of this office dated

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November 29, 1937, still apply or should it be modified under the provisions of the School Code?

To Hon. Colin English, State Superintendent of Public Instruction:

In the opinion referred to, which appears in the Biennial Report for 1937-1938, on page 37, it was held that Chapter 16817, Acts of 1935, which provided that each member of the board of public instruction of certain counties should be paid \$1200 out of the General School Fund of such counties, "has the effect only of repealing by implication the amount of per diem or compensation provided for in Section 526, Compiled General Laws of Florida."

I cannot agree with the opinion on this point for the following reasons:

Section 526, Compiled General Laws, which was adopted as Section 450, Revised General Statutes of 1920, reads as follows:

"Compensation of members of county board.—The members of the various county school boards shall be paid from the county school fund for their services, four dollars per day, for each day's service, and ten cents per mile for every mile actually traveled in going to and from the county court house by the nearest practicable route."

As I read this Act, the legislative intent is clear that the ten cents per mile provided for therein is part of the compensation for the "services" of the members of the county school boards, and is not to be regarded as reimbursement for actual expenditures made in traveling. This ten cents for each mile traveled, it will be noted, is twice that allowed to State officers for mileage, when those officers use privately owned cars, but there is no similar requirement in Section 526, the ten cents per mile being allowed apparently without regard to the means of transportation or the actual cost of the transportation. Furthermore, when the statute was re-enacted, as Section 450, of the Revised General Statutes of 1920, the entire section, including the provision as to ten cents per mile, was entitled, "Compensation of members of county board."

As I construe the language and structure of this statute, the members of the county school boards shall be paid "for their services, four dollars per day, for each day's service, and ten cents per mile . . ." In other words, ten cents per mile constitutes a part of the compensation of the members of the county board. Therefore, any valid law subsequently passed covering the field of the compensation to be paid to members of certain county school boards necessarily repeals by implication Section 526 in its entirety as to such members.

With regard to the other points covered in the opinion of November 29, 1937, I see no reason to change the conclusions relative thereto on account of any of the provisions of the School Code, and so I reaffirm this opinion except as stated above.

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July 22, 1941.—041-394.

BOARD OF PUBLIC INSTRUCTION—MEMBERS—MILEAGE

QUESTION: (1) Would members of boards of public instruction receiving compensation for their services under Section 547, C. G. L. 1927, be entitled to receive mileage in going to and from the county courthouse to attend meetings of the board in addition to the \$600.00 annual salary stipulated by this section?

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(2) If the members receiving compensation under Section 547, C. G. L. 1927, received mileage for such travel for the month of January, 1931, would the provisions of Chapter 15778, Acts of 1931, allow them to continue to receive such mileage, even if the answer to the first question is in the negative?

To Hon. W. M. Wainwright, State Auditor:

(1) In a letter dated March 18, 1941, addressed to the State Superintendent of Public Instruction, I stated that in my opinion the mileage provided in Section 526, C. G. L. 1927, was part of the compensation of members of the county boards and that therefore any valid law subsequently passed covering the field of compensation to be paid to members of certain county school boards necessarily repealed by implication Section 526 in its entirety as to such members.

Section 547 which was passed subsequently to Section 526 reads:

"The members of the various boards of public instruction in counties having a population of not less than eighteen thousand eight hundred seventy and not more than nineteen thousand persons, according to the fifth census of the State of Florida taken in the year 1925, shall be paid from the county school funds for their services an annual salary of six hundred dollars each, payable in monthly installments."

Your first question should therefore be answered in the negative.

(2) It is also my opinion that this conclusion is not changed in any way by the provisions of Chapter 15778, Acts of 1931, and that Act clearly refers to salaries which were lawfully paid for the month of January, 1931.

In rendering this opinion I do not pass upon the constitutionality of Section 547.

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March 26, 1942.—042-144.

**BOARD OF PUBLIC INSTRUCTION—RIGHT TO PROPERTY HELD
IN NAME OF MUNICIPALITY**

QUESTION: (1) In some cities in this state school buildings were constructed years ago on property to which the title was vested in the municipality. No formal transfer of the title has occurred, although the property has been used continuously for school purposes and has been under the control of the county board of public instruction in the county in which such municipality is located. Should the county school board be considered as having title to such property at the present time?

(2) Would the county school board have the authority to dispose of such property if desirable to do so?

To Hon. Colin English, State Superintendent of Public Instruction:

The legislature has plenary power over municipalities, except as restrained by the Constitution. *City of Orlando v. Evans*, 132 Fla. 609; 182 So. 264 (1938). Article VIII, Section 8, of the Florida Constitution provides:

"The Legislature shall have power to establish and abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time. . . ."

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The legislature, in Section 6 of Chapter 16170, Laws of Florida, 1933, provided:

"In any county where any property, real or personal, is now held by, for or in the name of the Trustees of Special Tax School Districts for public educational purposes, such Trustees or other persons or corporations holding such title shall within sixty days after the passage of this Act convey or cause the same to be conveyed to the Board of Public Instruction for said County, so that all property in said county devoted to public educational purposes shall be held by said Board. . . ."

This Act contemplates a transfer by a municipal corporation to the county school board of the legal title to any property such as you have described. This is consistent with the well recognized power of the legislature over property owned by a municipal corporation in its public and governmental capacity as distinguished from property held by it in a proprietary capacity. *McQuillan, Municipal Corporations*, 2d Ed., Section 238; *Trenton v. New Jersey*, 262 U. S. 182, 188 (1923). The legislature may take, without compensation, municipal property held in a public and governmental capacity and vest it in other agencies without contravening the contract clause or the due process clause of the federal constitution. *Hunter v. Pittsburgh*, 207 U. S. 161, 178 (1907).

Since the 1933 Act, cited above, became effective, it has been the duty of any municipality holding title to school property to transfer such title to the board of public instruction for the county in which the municipality is located. If any such municipality has failed to so transfer the title, it is merely holding the title in trust for the county school board. It is duty bound to transfer the legal title to the county board and may be compelled to do so. Until the legal title is transferred, however, the county board cannot be considered as having legal title to any such property. It has the equitable title only, with a right to have the legal title transferred to it.

(2) In my opinion the county school board, after the transfer of title from the municipality to the county school board, would have the same authority to dispose of such property, subject to the requirements of the School Code and the rules of the State Board of Education, that it would have to dispose of any other school property under its control.

COUNTY SCHOOL OFFICERS AND PERSONNEL

April 23, 1941.—041-227.

PRINCIPALS AND TEACHERS—RECOMMENDATION FOR REAPPOINTMENT

QUESTIONS: (1) Section 433 (7-b, d) makes it the duty of the County Superintendent to submit to the Trustees his recommendations for persons to serve as principals and teachers. Section 443 (1 and 2) makes it the duty of the Trustees to submit nominations after considering recommendations of the County Superintendent for principals and of the County Superintendent and principals for teachers. Does this imply that all recommendations relating to reappointment are to be submitted to Trustees before the time prescribed by law for Trustees to submit their nominations relating to reappointment and that all recommendations relating to appointment of persons to fill vacancies are to be submitted in advance of the time prescribed by the County Board of Trustees to submit nominations to fill those vacancies?

(2) If the County Superintendent and principals have submitted recommendations as required by law, are Trustees required to give proper

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consideration to these recommendations before submitting their nominations? If any such recommendations have been filed with the Trustees and the records do not show that any consideration has been given to such recommendations by the Trustees, would any failure to consider recommendations submitted by the County Superintendent and principals constitute cause for the County Board to reject nominations submitted by Trustees?

To Hon. Colin English, Superintendent of Public Instruction:

It is my opinion that the first question should be answered in the affirmative.

Answering the first part of the second question, it is my opinion that if the County Superintendent and principals have submitted recommendations as required by law then school trustees should give proper consideration to such recommendations before submitting their nominations.

Answering the subsequent part of said inquiry, it is doubtful that the school trustees keep written record of their acts. They are required under law to give proper consideration and all officials are presumed under the law to have faithfully performed their duties unless the contrary may be shown. It is, therefore, my opinion that a mere failure to make a record of the proper consideration by such trustees of recommendations would not constitute cause for the County Board to reject nominations made by such trustees.

COUNTY SCHOOL OFFICERS AND PERSONNEL

June 30, 1941.—041-348.

PRINCIPALS—EMPLOYMENT

QUESTION: Should Section 503 of Chapter 19355, Acts of 1939 be interpreted to refer to a person who is now a principal or only to entering principals?

To Hon. Colin English, State Superintendent of Public Instruction:

Section 503 reads in part:

"After July 1, 1941, no person shall be employed as principal of a school with three or more teachers or as supervisor who has not had two years of experience as teacher and attained the age of twenty-three years."

This Section refers to every person who is, after tomorrow, acting and employed as a principal of a school with three or more teachers, regardless of whether such person was previously employed as a principal or whether he is employed as such principal for the first time after tomorrow.

COUNTY SCHOOL OFFICERS AND PERSONNEL

January 6, 1942.—042-1.

PRINCIPALS—REAPPOINTMENT

QUESTION: If a county superintendent fails to recommend for reappointment as principal in a school a person who has already been appointed to serve in that capacity and who is serving in that capacity, and instead recommends some other person for the position, would the

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trustees be within their rights in rejecting for good cause the person newly recommended by the county superintendent, provided they desire to retain the services of the principal who has been serving in the school?

To Hon. Colin English, State Superintendent of Public Instruction:

Under Section 443 (1) of the School Code, the school district trustees are given power—

"To consider the recommendations of the County Superintendent regarding all persons to be nominated by them for district supervising principals or principals of all district schools and to make nominations for such positions to the County Board."

Section 535 of the School Code, as amended, provides that:

"... the terms 'to consider the recommendations of' or 'to act upon the recommendations of' shall be interpreted to mean that neither the trustees nor the County Board shall act on the appointment of employees without having considered any recommendations or nominations submitted as prescribed by law, that such recommendations or nominations may be rejected only for good cause, . . ."

Under these provisions, the trustees may reject for good cause a recommendation for a person to be nominated as district supervising principal or principal of a district school. In my opinion, continuity of service and past successful experience are such vital factors in maintaining an efficient school system that the rejection of the recommendation of a county superintendent in order that the trustees may recommend the reappointment of the principal who has been serving the district or school should be construed as a rejection for "good cause" within the above provisions.

I wish to point out that under Section 535 of the School Code, as amended, there is a clear distinction between "reappointments" and "filling vacancies." The provisions of this section contemplate that there is no vacancy in an instructional position, which includes the position of principal, until the matter of the reappointment of the person who has been holding the position has been disposed of, either by the action of the person involved or by the recommendation of the trustees or the county school board, as provided in this section. Accordingly, the recommendation by the county superintendent of a person other than the incumbent for the position of school principal would not be in order and would not have to be considered by the district trustees until the matter of the reappointment of the incumbent had been disposed of.

COUNTY SCHOOL OFFICERS AND PERSONNEL

February 11, 1941.—041-62.

PRINCIPALS—TRANSFER AND APPOINTMENT

QUESTION: Does the County Board have authority to transfer the principal of one school in a district to the principalship of another school in the same district without obtaining the approval of the Trustees?

To Hon. Colin English, State Superintendent of Public Instruction:

The provisions of the School Code regarding the transfer and appointment of principals within a district are unfortunately not explicit on this point, and the question is an extremely close one.

Section 433 (7) (h) provides that the county superintendent shall have the duty to

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"... recommend employees for transfer and to transfer any employee during any emergency and report the transfer to the County Board at its next regular meeting: Provided that, if the school to which the transfer is to be made is a district school and is located in another district from the one in which the employee was previously serving, the consent of the trustees shall be obtained, as provided herein, before the transfer is made; and to recommend capable employees for promotion and advancement."

This provision seems to mean that during an emergency, the County Superintendent may transfer an employee and report the transfer to the County Board at its next regular meeting, with the exception that the consent of the Trustees must be obtained, if the transfer is to a school in another district, before the transfer is made; and further that the County Superintendent may recommend employees for transfer to the County Board. Referring then to the powers and duties of the County Board, we find in Section 423 (7) (h), that said Board has the power and duty,

"... To act on recommendations of the County Superintendent regarding transfer and promotion of any employee, subject to the provisions of Article 4 of this Chapter of the School Code."

Article 4 of the Chapter contains the following provision in Section 443 (1):

"NOMINATION OF DISTRICT SUPERVISING PRINCIPALS OR PRINCIPALS.—To consider the recommendations of the County Superintendent regarding *all* persons to be nominated by them for district supervising principals or principals of all district schools and to make nominations for such positions to the County Board: Provided that all nominations for reappointment of district supervising principals or principals shall be submitted to the County Board at least eight weeks before the close of school."

Thus it seems that even if a principal is an employee within the meaning of Section 433 (7) (h) first quoted in this letter, the recommendation of the County Superintendent and the action thereon by the County Board would be subject to the consideration of the Trustees under Section 443 (1). This conclusion is not necessary, however, in my opinion, since I believe that a principal is not to be considered an employee within the meaning of Section 433 (7) (h), for just preceding it, in a parallel provision, Section 433 (7) (c), the following is found as to the duty and power of the County Superintendent:

"DISTRICT SUPERVISING PRINCIPALS OR PRINCIPALS OF DISTRICT SCHOOLS.—To submit to the trustees of each school district his recommendation of a person to *fill the position* of district supervising principal or *principal of each district school*."

This specific provision relating to the recommendation to the Trustees of each School District of a person to fill the position of principal of each district school, which recommendation is to be considered by the Trustees under Section 443 (1), appears to place principals of schools in a different class from general employees. The fact that a principal is a key figure in the educational life of a district, gives further reason to this treatment of him on a distinctive basis in the matter of appointment and transfer.

Therefore, the approval of the Trustees of a district should be obtained where a principal of one school in a district is transferred to the principalship of another school in the district.

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May 6, 1941.—041-238.

TEACHERS AND BUS DRIVERS—RECOMMENDATION FOR APPOINTMENT

QUESTION: Who shall nominate persons to fill the positions of teachers and bus drivers in county school systems?

To F. E. Collier, Esq., Cornwell, Florida:

Statutes of Florida provide that where school districts have been established, the Trustees of the District consider the recommendations of the District supervising principal, or the principals of the schools in the District, and the County Superintendent, regarding the nomination of teachers to serve in the District Schools, and to make nominations for such positions to the County Board of Public Instruction, and the County Board is authorized to act on the nominations. (Sections 423 and 443 of the School Code.)

The laws also provide that the County Board of Public Instruction shall act on the recommendations submitted by the County Superintendent, of persons to act as bus drivers, and to appoint persons to fill such positions. (Section 423).

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July 9, 1942.—042-341.

SCHOOL DISTRICT TRUSTEES—APPOINTMENT

QUESTION: The Board of Public Instruction of Marion County appointed a person as trustee to fill a vacancy in District No. 12 in Marion County. This appointment was made by the county board of public instruction pursuant to a petition signed by seven patrons without talking to any of the patrons of the district and without a personal appearance being made before the board by any of such patrons. Was such person properly appointed as trustee, and if not, what procedure should be followed?

To Hon. Colin English, State Superintendent of Public Instruction:

In my opinion the person involved was not properly appointed as trustee. Section 423 (13) (b) of the School Code provides that the county board shall fill such a vacancy "after consulting with the patrons of the school." "To consult" has been judicially defined as "to apply to for direction or information; to ask the advice of—as to consult a lawyer; to discuss something together; to deliberate." This is, I think, the commonly accepted meaning of the word "consult." Accordingly, for the county school board to make a legal appointment it is necessary for the board to discuss the matter with the patrons of the district concerned in order to obtain their views. The object of the statute is, obviously, to require the county board to obtain direct information from the local patrons as to a suitable person to be appointed. The county school board is not required by the statute to follow the advice of the patrons, but the county board must discuss the matter with some of the patrons.

Inasmuch as an illegal appointment has been made, it should be recalled and the selection of such trustee proceeded with in the proper and legally prescribed manner. In order to clarify the matter the county board should pass a resolution declaring the office to be vacant,

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stating the reasons therefor. They should then proceed to appoint a trustee in accordance with Section 423 (13) (b) of the School Code, as outlined above.

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March 10, 1941.—041-123.

SCHOOL DISTRICT TRUSTEES—DISBURSEMENT OF FUNDS

QUESTION: (1) May the school district trustees in Florida use district funds for legal advice or for clerical assistance?

(2) Should needed legal advice for the district be provided by the attorney for the County Board, and any needed clerical assistance obtained through the office of the county superintendent or the principals of the various schools?

To Honorable Colin English, State Superintendent of Public Instruction:

There is no express provision in law for trustees to use district funds for these purposes, nor does there seem to be an implied authority for the trustees to use those funds in this way except when authorized by the county board of public instruction under the conditions discussed in the following paragraphs.

The School Code specifically declares that the schools in any school district shall be "under the general supervision but not under the control of the trustees of that district, who shall constitute an advisory and limited policy-forming body for the district," (Section 403), and that the powers of the trustees "shall be supervisory in nature and not administrative or controlling powers." (Section 442.) The trustees' general and specific powers as enumerated in Sections 442 and 443 are almost exclusively advisory, supervisory or recommendatory powers.

If in the exercise of those powers by the trustees, however, a need for legal advice or clerical assistance should arise, I see no reason why in such a case the county board may not properly provide for the furnishing of such advice or assistance to the trustees, in accordance with regulations that may be prescribed by the State Board of Education.

Among the many powers and duties imposed upon the county board are the power and duty to "contract for materials, supplies, and services needed for the county school system . . ." (Section 423). The exercise of this power is subject to the provision in Section 538 that "contracts with personnel other than instructional personnel shall be made as prescribed by law, by regulations of the State Board, and by regulations of the County Board."

The county board has the further general power and duty "to assume such other responsibilities and to exercise such powers and perform such duties as may be assigned to it by law or as may be required by regulations of the State Board or as, in the opinion of the County Board, are necessary to provide for the more efficient operation of the county school system in carrying out the purposes and objectives of the School Code." (Section 423.)

It is my opinion, therefore, that if the county board should determine that the furnishing of legal advice or clerical assistance to the trustees is necessary to provide for the more efficient operation of the county school system, the county board has the power to authorize expenditures for these purposes, if the exercise of such power is in ac-

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cordance with the regulations prescribed by the State Board of Education. Without such determination and approval, such expenditures cannot legally be made.

No doubt using the services of those already employed, frequently would be the most economical, and when such services are readily available the expenditure of additional funds would, of course, not be necessary. But when those services are not available, additional services may be contracted for by the county board, in accordance with the regulations of the State Board as required by Section 538. In applying the above test, it should be borne in mind that each county, as declared in Section 401, constitutes "a unit for the control, organization, and administration of schools."

Summarizing this opinion, therefore:

The Trustees cannot use district funds for legal advice or clerical assistance except upon the authorization of the county board of public instruction in accordance with the regulations of the State Board of Education, which authorization must be based upon a finding by the county board that the expenditure of such funds is necessary to provide for the more efficient operation of the county school system.

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December 3, 1941.—041-704.

SCHOOL DISTRICT TRUSTEES—EMPLOYMENT OF LEGAL COUNSEL

QUESTION: Do trustees of a school district have authority under any circumstances to employ counsel without the consent of the county school board?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 717, C. G. L. 1927, provides:

"The trustees of any school district shall be a corporation and may hold property, sue and be sued, and perform other corporate functions, and perform the usual duties necessary to provide buildings, repair the same, and to purchase libraries and other school appliances: Provided, that no debt shall be created without the approval of the county board of public instruction."

This section has probably been superseded by the enactment of the Florida School Code which became effective July 1, 1939. This was considered to be the case both by the draftsmen of the School Code (see appendix C to the School Code) and by the revisors of the Florida statutes in 1941. (See tables corresponding sections preliminary draft "Florida Statutes 1941.")

Section 442 of the School Code states, "The powers of the trustees shall be supervisory in nature and not administrative or controlling powers," and enumerates the powers of the district trustees, none of which confer power to employ legal counsel.

Section 436 of the School Code provides: "The powers of the trustees shall not be those of control but of general supervision only . . ."

It, therefore, appears that by the adoption of the School Code, the legislature has vested the administrative powers over, and the control of the budget of, the public school system of the county in the County Board of Public Instruction, subject to the rules and regulations of the

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State Board of Education and the direction of the State Superintendent of Public Instruction.

Accordingly, the trustees of the school district do not have the power to incur a debt for any purpose including the employment of legal counsel without the approval of the county school board. This was true even under Section 717 C. G. L. 1927.

Pursuant to its power to adopt rules and regulations having the full force and effect of law under Section 306 of the School Code, the State Board of Education on April 1st, 1941, adopted the following regulation:

"If legal services are needed to care for the problems arising in any school district in the county, such legal services shall be provided through the attorney for the County Board, or if the Board does not have an attorney, through an attorney authorized and approved by the County Board, in order that all legal services for the schools of the county may be properly integrated and coordinated."

On the basis of this regulation of the above provisions of the Florida School Code, my opinion is that the school district trustees have no authority to employ legal counsel. If the trustees need legal counsel, they should make a request for such of the county school board in accordance with the above regulation of the State Board of Education. If a controversy has arisen between the county school board and the district trustees and the county school board refuses to arrange for legal counsel for the trustees, the trustees should apply to the State Board of Education which, under its general powers granted by Section 307 of the School Code and its power to hear and determine controversies under Section 308 (17) of the School Code, could arrange for legal representation for the trustees consistent with the terms of the county and district school budgets.

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March 5, 1941.—041-114.

SCHOOL DISTRICT TRUSTEES—RESIDENCE QUALIFICATIONS

QUESTION: When a trustee of a school district moves his residence out of the district in which he was elected, does his office become vacant?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 440 of the School Code provides:

"Vacancy in office of Trustee.—The position of trustee shall be considered to be vacant in any school district when any person holding the office of trustee removes his residence from the district."

It is impossible to lay down a hard and fast rule as to exactly what is meant by "residence" in statutes of this kind. The Florida Supreme Court in *Herron vs. Passallaigue*, 92 Fla. 818, 110 So. 539, held that the word "residence" when used in statutes relating to the right of suffrage and the like, is "used in the sense of 'legal residence'; that is to say, the place of domicile or permanent abode, as distinguished from temporary residence."

The courts have held that statutes similar to Section 440 are mandatory and must be complied with or else the office will be vacated. They have also held that the question of what is residence under such statutes is one of law to be determined by the consideration of the intention and

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overt acts of the official; that his legal residence in a district is not lost by temporary absence for health, business or pleasure, or while attending to the duties of a public office.

In other words, a trustee may be temporarily absent from his district for reasons of business or pleasure or similar reasons, without his office being vacated under the statute. However, if he manifests an intention to reside permanently outside the district in which he was elected, his office will be vacated.

As said before, each case must be examined separately to determine whether the trustee has removed his residence from the district. You mention the case of a trustee who is "in service and returns to the district only occasionally." If this trustee has been called into military service, but still regards his residence as in the school district in which he was elected, and otherwise manifests an intention to reside in that district, in my opinion his office has not been vacated under the statute.

With regard to the trustees who, you say, "actually are living out of the district and it would be difficult, if not impossible, for them to perform their duties as trustees," each case will have to be determined separately under the test of "residence" stated above.

Where a trustee has in fact removed his residence from the district in which he was elected, his office becomes vacant and it is not necessary for him to resign before his office is considered vacant.

COUNTY SCHOOL OFFICERS AND PERSONNEL

November 20, 1942.—042-524.

SCHOOL DISTRICT TRUSTEES—RESIDENCE QUALIFICATIONS

QUESTION: Has a school district trustee, who removes his residence out of the school district but continues to maintain his business in the district, the necessary qualifications to continue to hold the office?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 230.37 Fla. St. '41 (§437, Ch. 19355, Acts of 1939) provides, "trustees for any school district shall consist of three members who are qualified electors in the district . . ."

The Florida Supreme Court in *State ex rel. Landis v. County Board of Public Instruction*, 137 Fla. 244, 188 So. 88, held the qualifications of electors in school district elections are those prescribed by §1, Art. XII of the Florida Constitution, one of which is that the person "shall have resided and had his habitation, domicile, home and present place of abode" in an area in and as limited by §10, Art. XII thereof, relative to school districts.

Section 230.40 Fla. St. '41 (§440, Ch. 19355) provides, "the position of trustee shall be considered to be vacant in any school district when any person holding the office of trustee removes his residence from the district."

It is my opinion that when the officer moved his residence and permanent place of abode out of Tax School District No. 1, he no longer had the necessary qualifications as an elector of that district to entitle him to hold the office of district trustee and the position of the trustee should be considered as vacant. (56 C.J. 325.)

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May 28, 1941.—041-290.

**TRUSTEES—SUPERVISION OVER SCHOOLS NOT SUPPORTED BY
SCHOOL DISTRICT FUNDS**

QUESTION: (1) Under Section 403 (5) of the School Code (Chapter 19355, Acts of 1939) may a school constructed through the use of district bond funds be declared a county school if no district funds are used for the support of the school?

(2) If an elementary and high school are conducted in the same building or in adjoining buildings on the same site and if district funds are used to help support the elementary school but are not used in any manner for the support of the high school, should the high school properly be declared by the County Board a county high school?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 403 (5) of the Florida School Code provides:

"County Schools.—Any or all schools in the county for the support of which no school district funds are used may be designated as county schools and if so designated shall not, in any way, be subject to the supervision of trustees of any district."

The test of whether a school should be designated a county school, and hence not subject to the supervision of the trustees of any district, is, under that section, whether school district funds are used for the support of such school. Clearly, then, a school constructed through the use of district bond funds may be declared a county school if no district funds are used for the support of the school.

Similarly, the fact that the school in question may be conducted in the same building as another school supported by district funds, or in adjoining buildings with such a school on the same site, cannot affect the requirement that school district funds must be used for the support of the particular school to prevent the operation of Section 403 (5).

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March 28, 1942.—042-171.

SCHOOL PERSONNEL—MILITARY LEAVE OF ABSENCE

QUESTION: (1) What is the proper action to be taken in connection with the granting of a leave of absence to a county superintendent for military service?

(2) What procedure is to be followed when military leave of absence is granted to a member of a county school board; if a vacancy is created, how is the vacancy to be filled and would one appointed to fill such vacancy have to be bonded as a regular member of the board?

(3) What procedure is to be followed when military leave of absence is granted to a district school trustee and if a vacancy is created, how is it to be filled?

To Honorable Colin English, State Superintendent of Public Instruction:

(1) Section 431 of the School Code as amended by Chapter 20970, Laws of Florida, 1941, provides:

"... when the County Superintendent of any county is required to be absent on account of performing services in the volunteer forces

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of the United States or in the National Guard of the State of Florida or in the regular Army or Navy of the United States, when the said County Superintendent shall be called into active training or service of the United States under an Act of Congress or pursuant to a proclamation by the President of the United States, he shall then be entitled to a leave of absence for not to exceed the remaining portion of the term for which he was elected."

In my opinion this enactment entitles a county superintendent, as a matter of right, to a leave of absence for military service under the conditions stated. It is not in any sense a discretionary matter.

When a county superintendent is on leave of absence for military service, a vacancy in the office is not created thereby. This is the plain meaning of the term "leave of absence" in the above statute. Leave of absence is defined as "permission to leave a post of duty." (See Funk & Wagnalls Standard Unabridged Dictionary.) Even at common law a temporary absence for war service does not constitute an abandonment of a public office. *State v. Board of Education*, 108 Kan. 101, 193 Pac. 1074 (1920).

Section 548 of the School Code provides: "It shall be the duty of the County Board to make regulations governing absences of any personnel not covered by the School Code."

Section 118 (15) provides: "Administrative personnel comprises the County Superintendent and those persons who may be employed as professional administrative assistants to the County Superintendent, . . ."

It appears, therefore, that the county superintendent falls within the term "personnel" and that his being on leave of absence for military purposes constitutes an "absence." Therefore, my opinion, is that the situation is controlled by Section 548 of the School Code. Accordingly it is the duty of the county board of public instruction to make regulations concerning the selection of the person to perform the functions of the office of county superintendent during his leave of absence. These regulations should cover the fixing of his bond and the designating of his duties and responsibilities.

(2) Chapter 20718, Laws of Florida, 1941, provides that "All State and County officials in the State of Florida, and all others who hold office under the government of the State of Florida, and who are officers either in the Florida Defense Force, the National Guard, the Naval Militia, Marine Corps, Unorganized Militia, United States Army Reserve, United States Navy Reserve, United States Marine Corps Reserve, United States Coast Guard Reserve, or officers in any other class of the militia, or county school officers, and all municipal officials in the State of Florida" may be granted a military leave of absence on application to the Governor and within his discretion. A member of a county school board is clearly covered by this Chapter.

In my opinion, as I have indicated above in my answer to your first question, if such a military leave be granted, no vacancy would thereby be created and there would, accordingly, be no authority for filling any vacancy.

(3) The Legislature evidently contemplated that school district trustees are covered by Chapter 20718, Laws of Florida, 1941, in view of the broad language used in Section 1. The same answer which I have given to your second question would be applicable to your third question.

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June 5, 1941.—041-298.

SUPERINTENDENT OF PUBLIC INSTRUCTION—POWERS AND DUTIES

QUESTION: Chapter 19577, Acts of 1939, prescribes the powers and duties of Superintendents of Public Instruction "in each county of the State of Florida having a population of more than 180,000 according to the last State or Federal Census." Is this chapter binding on all counties with a population of 180,000 according to the last Census?

To Hon. Colin English, Superintendent of Public Instruction:

There has been no express repeal of this statute, nor do I find that there has been an implied repeal. The Florida School Code (Chapter 19355, Acts of 1939) also prescribes the powers and duties of County Superintendents, and Section 106 of that Chapter provides, with certain exceptions, for the repeal of all general, special and local laws in conflict with the provisions of the Florida School Code. However, Section 109 of the Code provides:

"All general Acts relating to Education which are enacted into law during the 1939 Regular Session of the Legislature of the State of Florida shall, unless otherwise designated, become a part of the Florida School Code."

Chapter 19577 does not otherwise designate, and so appears to come within Section 109 of the Code if Chapter 19577 is to be considered a general Act.

At the time of the passage of Chapter 19577, the Act was applicable only to Dade County, the only county having a population of more than 180,000 according to the 1935 State Census. The counties of Dade, Duval and Hillsborough are now within this population range by virtue of the 1940 Federal Census.

The State Supreme Court in a number of recent cases has upheld as general Acts laws applicable to counties having more than a stated population, but without any top limit to the population range, and I am inclined to the view that the Supreme Court would uphold Chapter 19577 as a General Act. Section 7 of the Act provides that notice for the passage of the Act had been published as required by Section 21 of Article III of the Constitution, but I believe that the Court would nevertheless uphold the Act as general and regard Section 7 as surplusage.

In answer to your question, then, Chapter 19577, Acts of 1939, appears to be binding at present on the counties of Dade, Duval and Hillsborough, which have a population of more than 180,000 according to the 1940 Federal Census. In giving you this opinion, of course, I am assuming that the present Session of the Legislature, which adjourns sine die on tomorrow, has not enacted and will not enact any Act repealing Chapter 19577, either expressly or impliedly.

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April 22, 1941.—041-213.

TEACHERS—CITIZENSHIP

QUESTION: Should a person who has been issued a special certificate in instrumental music be permitted to retain such certificate if it should be definitely determined that he is not a citizen?

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To Hon. Colin English, Superintendent of Public Instruction:

Section 517 of Chapter 19355, Laws of Florida, Acts of 1939, provides in part as follows:

"The State Superintendent shall issue, in accordance with State Board Regulations, a certificate of the proper type to any person possessing the qualifications for such a certificate as prescribed herein, and by rules and regulations of the State Board, who pays the required fee, makes application in writing on the form prescribed by the State Superintendent, submits satisfactory evidence that he possesses said qualifications, and who meets the requirements given in section 518 of the School Code. To be eligible for a certificate to serve in an administrative or instructional capacity, the applicant shall be at least eighteen years of age, shall be a citizen of the United States, . . ."

This law went into effect on June 12, 1939. Mr. Frank Sturchio received his certificate on September 30, 1939. It is necessary that an individual be a citizen of the United States prior to his employment in an administrative or instructional capacity as a regular or part time or substitute employee in the public schools of this State. The certificate apparently was issued to Mr. Sturchio through error. He actually acquired no rights under it, as the authority issuing same was not permitted to lawfully do so. His right to teach instrumental music in the public schools of this state, depends upon the law which permits his employment. Unless he fulfills the requirements for certification, he would acquire no vested rights.

If you should definitely determine that Mr. Sturchio is not a citizen of the United States, then you will have to revoke the certificate previously issued him to teach in the public school system of the State of Florida.

COUNTY SCHOOL OFFICERS AND PERSONNEL

September 16, 1941.—041-532.

TEACHERS—CITIZENSHIP

QUESTION: Has the State Board of Education authority to waive the law which states that U. S. citizenship is a requisite for teacher certification?

To Hon. Colin English, State Superintendent of Public Instruction:

My opinion is that this question must be answered in the negative.

The Legislature of Florida has, in Section 517 of the Florida School Code, provided that ". . . To be eligible for a certificate to serve in an administrative or instructional capacity, the applicant . . . shall be a citizen of the United States . . ." This provision appears to be a positive mandate and does not permit of the exercise of any discretion in the matter by the State Board of Education. Neither do the provisions relating to the powers of the State Board of Education provide, or even imply, that the State Board of Education has any discretion regarding the citizenship requirement.

COUNTY SCHOOL OFFICERS AND PERSONNEL

May 13, 1941.—041-258.

TEACHERS—DISCHARGE UNDER TENURE ACT

QUESTION: Is a teacher in the public schools of Volusia County, now under tenure, and whose services are discontinued because the

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Board of Public Instruction through financial necessity deems it necessary to decrease the number of permanent employees of the particular kind of service in which the dismissed teacher was engaged, obliged to be retained?

To Hon. Colin English, Superintendent of Public Instruction:

Chapter 18964, Laws of Florida, Special Acts of 1937, provides for the tenure of employment of teachers in Volusia County. Section 3 of that Act provides that no person who has qualified as a permanent employee shall be thereafter dismissed or not re-employed for any subsequent year in such free schools except for certain reasons. Section 4 of that Chapter provides:

"It is hereby expressly provided however that nothing herein contained shall prevent the dismissal or failure to re-employ any teacher where the Board of Public Instruction through financial necessity or curriculum changes deems it necessary to decrease the number of permanent employees of the particular kind of service in which the dismissed teacher was engaged. If such similar service is re-established within two years thereafter, all dismissed teachers who were dismissed otherwise than for cause shall be offered re-employment prior to the employment of any new teacher in a similar capacity, and teachers so dismissed without cause shall be offered re-employment in the same order in which they were dismissed but if such re-employment is not accepted, the teacher shall forfeit his or her previous tenure rights."

Section 3 of Chapter 18964 was amended by Section 3 of Chapter 20187, Laws of Florida, Special Acts of 1939, by the addition of certain other causes for dismissing or not reemploying permanent employees. Although the 1939 Act provides in such section that no permanent employee should be dismissed or not re-employed except for the specified reasons, and although Section 4 of the 1939 Act provides that all laws and parts of laws in conflict are repealed, it is my opinion that Section 3 of the 1939 Act did not have the effect of repealing Section 4 of the 1937 Act providing for dismissal or failure to re-employ teachers on account of financial necessity or curriculum changes. As the Florida Supreme Court said in *State vs. Gray*, 107 Fla. 73, 144 So. 349:

"The amendments to sections and parts of sections have the same relation to other portions of the same law as did the sections or parts of sections that were amended."

In the discharge of a permanent teacher through financial necessity or curriculum changes, the question arises as to the meaning of the words in Section 4 of the 1937 Act: "the particular kind of service in which the dismissed teacher was engaged."

In my opinion this does not necessarily mean the particular kind of service in which the dismissed teacher was engaged at the time of his discharge. It seems to me that the spirit of tenure laws of this kind requires that that language be construed as meaning the particular kind of service in which the dismissed teacher was engaged within a reasonable period prior to such discharge, and in which such teacher possesses the requisite qualifications.

I note that the teaching record of the teacher in question since 1932 shows that at least from 1932 to 1940 he taught in high schools of the State, and for the last year taught in the sixth grade of an elementary school. In such a case if it were held that only the sixth grade constituted the particular kind of service for this teacher, while in the preceding eight years he had taught in the high schools, such holding would

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not be in consonance with the spirit of tenure Acts, assuming such teacher still possesses the qualifications to teach in the high schools as he had done prior to the last year.

If the Board of Public Instruction through financial necessity or curriculum changes deems it necessary to decrease the number of permanent employees of the particular kind of service in which the dismissed teacher was engaged within a reasonable period prior to such discharge, as set forth above, such teacher may be dismissed under the provisions of Section 4 of the 1937 Act; but such necessity to decrease the number of permanent teachers would not seem to exist while non-permanent teachers are retained in such service.

COUNTY SCHOOL OFFICERS AND PERSONNEL

May 31, 1941.—041-300.

TEACHERS—EMPLOYMENT UNDER TENURE ACT

QUESTION: Has a teacher, who during her probationary period serves one or two years in two or more districts, secured tenure in one of those districts, or has secured tenure in the county? If the trustees of the last district in which she served refuse to recommend her appointment, can the county board force the trustees of that district to accept that teacher, although she has not served her full probationary period in that district?

To Honorable Colin English, Superintendent of Public Instruction:

The Teachers Tenure Act in effect in Hillsborough County is Senate Bill No. 43, which was enacted by the present session of the State Legislature, and became a law on May 5, 1941. Section 1 of that Act reads in part as follows:

"The term 'public schools,' as used in this Act, shall be deemed to embrace any public school of Hillsborough County, Florida, or of any special tax school district therein, or maintained in part by said County and in part by any special tax school district therein. . . .

"The term 'probationary period of employment,' as used in this Act, shall be deemed to refer to and include the duration of employment of any teacher in the public schools antecedent to the completion of employment of such teacher in the public schools of Hillsborough County, Florida, extending through a period of three consecutive years for the school term therein, whether such period shall have been completed before or shall be completed subsequent to the enactment of this law; . . ."

Section 3 of this Act provides:

"After the completion of a probationary period of employment without discharge, whether such period shall have been completed before or shall be completed subsequent to the enactment of this law, such teachers as have completed such probationary period of employment and have heretofore or shall hereafter be re-employed, shall continue in the service in which they are so employed without reduction in their compensation, during good behavior and efficient and competent service, and shall not be discharged or demoted except for one or more of the causes specified in Section 4 of this Act, after notice, hearing, and a finding of the existence of one or more of such causes as hereinafter provided for. No teacher shall lose his or her rights conferred by this section on account of any leave of absence granted such teacher in writing by the County Board of Public Instruction of said County."

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This Act, insofar as the present questions are concerned, is substantially similar to the teachers tenure Act in Orange County (Chapter 18743, Laws of Florida, Acts of 1937), which latter Act was interpreted by the Florida Supreme Court in *State ex rel. Glover v. Holbrook*, 129 Fla. 241, 176 So. 99, in the decision of which case the Court appears to have disposed of the questions involved here.

In that case one J. R. Glover had been employed as a teacher in the public schools of Orange County for ten years consecutively. From September, 1933, to September, 1935, he served as principal and teacher of the Winter Garden Orange County Elementary School, which school is in the seventh school district of that County; and from September, 1935, to June, 1937, he served as principal of the Pine Castle Orange County Elementary and Junior High School, which school is in the twelfth district.

On June 10, 1937, the Orange County Teachers Tenure Act became effective. On or about June 27, 1937, the trustees of the Special Tax School District No. 12 of Orange County refused to nominate Glover to the Board of Public Instruction of the County as principal of the Pine Castle School, but nominated in his stead one Perkins. On June 27, 1937, the Board of Public Instruction approved the nomination of Perkins, and Glover was thereby discharged from the service of the Public Schools of Orange County. Glover brought a proceeding in mandamus against the trustees, and a similar proceeding against the members of the Board of Public Instruction. The command of the alternative writ against the trustees of the district was that they nominate Glover to the position as principal of the Pine Castle School. The command of the alternative writ against the members of the Board of Public Instruction was that they forthwith appoint Glover to the position of principal of the Pine Castle School, or else transfer him to another school in Orange County in a position of equal rank with that enjoyed by him at the Pine Castle School. The Supreme Court said that this command was justified by the provisions of the special Act if the Act was valid. The Court in its final ruling held that a peremptory writ should be issued against the members of the Board of Public Instruction in line with the command of the alternative writ. The Court also in effect held that the trustees should be commanded to comply with the alternative writ.

In the opinion the Court discussed the questions propounded in your letter, saying:

"One of these questions concerns the probationary period of employment; that is, whether the relator must have served for three years consecutively in the Pine Castle School in order to come within the terms of the special Act. As above set forth, the relator had served for the past two years as principal of the Pine Castle School, and just previously to that had served for two years as principal of the Winter Garden School in said county. In view of these provisions of sections 1 and 3 of said act, above outlined, we think the relator had served the term of probationary employment required by the act necessary to give him the benefit of the protection to re-employment and reappointment provided by section 3 of the act."

The Court further said:

"It will thus be seen that this act, which is limited by its terms to Orange County, makes certain radical limitations upon the powers of nomination vested in the trustees of special school districts and the powers or appointment and employment vested in the County Board of Public Instruction by the provisions of section 710 of the Compiled Gen-

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eral Laws. It is true that notwithstanding this special statute the trustees of school districts in Orange County still have the empty power to nominate to the County Board of Public Instruction teachers for all schools within the special district, but under the special act, if a teacher in any one of such schools has served three years, the probationary period of employment provided in the act, the trustees are compelled to nominate him, or her, provided such teacher has not forfeited such right and the broad discretion theretofore vested in such trustees is to that extent taken away. Likewise, the Board of Public Instruction is compelled to reappoint and re-employ a teacher who has completed the probationary period referred to, and who has not been demoted or discharged for cause as provided in the act, and to that extent the broad discretion vested in the County Board of Public Instruction of Orange County, and which discretion is by the general law vested in the boards of public instruction of all the other counties in the State, is to that extent limited or taken away."

Under the holding of the Court in the above case, it would seem that a teacher who during her probationary period serves one or two years in two or more districts, has secured tenure in the district in which she is serving, and has also secured tenure in the County.

Similarly, the trustees of the district in which such teacher is serving, cannot refuse to recommend her re-appointment, merely because she has not served her full probationary period in that district.

In your letter you also mention that there seems to be a conflict between the provisions of this law and the law which gives authority to recommend teachers and requires the County Board to appoint the teachers so recommended. Where such a conflict exists, the local Act recently passed applicable to Hillsborough County will prevail.

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October 19, 1942.—042-493.

TEACHERS—EMPLOYMENT UNDER TWENTY YEARS OF AGE

QUESTION: Under emergency conditions is the State Superintendent of Public Instruction permitted by §§503 and 523 School Code, §§231.03 and 231.23, Florida Statutes 1941, in his discretion to award emergency certificates to persons who have not attained the age of twenty years?

To Honorable Colin English, State Superintendent of Public Instruction:

The purposes of the School Code as expressed in the Act are as follows:

§103—"It is the purpose of the Florida School Code to provide for the organization, establishment, operation, maintenance, and support of the State System of Public Education."

§201—"It is the purpose of the State Plan for Public Education to insure the establishment of a State system of schools, courses, classes, institutions, and services adequate to meet the educational needs of all citizens of the State." (Emphasis supplied.)

The purpose of the Legislature to insure the operation and maintenance of schools, further affirmatively appears by §522 School Code, wherein it provides for issuance of special certificates, and by §523 which

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provides for issuance of emergency certificates where there is no certified person available to fill a position.

In §308 of the Code, which specifically provides for the duties and responsibilities of the State Board of Education in the administration of the Act, Par. 20 authorizes said Board:

"To prescribe such minimum standards and rules and regulations as are required by law or as are recommended by the State Superintendent in accordance with the provisions of Article 3, Section 317, subsection (20) of this Chapter, and as it may find desirable to aid in carrying out the purposes and objectives of the School Code."

and Par. 23 authorizes said Board:

"To assume such other responsibilities and to exercise such other powers and perform such other duties as may be assigned to it by law or as it may find necessary to aid in carrying out the purposes and objectives of the School Code."

It is, therefore, my opinion, in view of the general objectives and purposes expressed in and for the School Code, and §104 thereof, which requires a liberal construction of its provisions to the end that its objectives may be effected and public education promoted, when confronted with an emergency of no available teacher of minimum age, that with the approval of the State Board of Education and subject to such regulations as the State Board may adopt governing the same, you may, under the authority of and following the procedure outlined by §231.23, issue an emergency certificate to a person less than twenty years of age.

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December 4, 1941.—041-676.

TEACHERS—LEAVE OF ABSENCE—COMPENSATION

QUESTION: (1) If a classroom teacher were to be eligible for a sabbatical leave every 7 years, could the board of public instruction legally pay the teacher on sabbatical leave the difference in salary between that of her contract and \$5.00 per day paid to the substitute teacher?

(2) When a classroom teacher has exhausted a sick leave allowance and a substitute teacher is employed, could the board of public instruction pay to the contract teacher the difference in salary?

To Hon. Colin English, State Superintendent of Public Instruction:

(1) Section 539 (1) of the Florida School Code, as amended by Section 5, Chapter 20970, Laws of Florida, 1941, provides:

"Extended leave for professional improvement may be granted for a period of not to exceed one year to any member of the instructional staff who has served satisfactorily and successfully in the schools of the county for a period of three or more years; Provided that partial compensation may be authorized only when the person has served in the county for seven or more years."

This provision clearly contemplates that partial compensation may be provided for a teacher on sabbatical leave after such teacher has served in the county for at least seven years, and a county board of public instruction could, in its discretion, fix the amount of such partial compensation as the difference between the contract salary and the

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amount paid the substitute teacher. Your first question should therefore be answered in the affirmative.

(2) Section 540 (2) of the School Code provides:

"Any individual so employed shall receive full compensation for the time justifiably absent on sick leave as prescribed in Sub-sections (1) and (3) hereof."

It appears from this provision that full compensation is provided for the teacher on sick leave in accordance with sub-sections (1) and (3) of the above section, but no provision whatever is made for paying any compensation to a teacher after the sick leave allowance provided for in sub-section (1) has been exhausted. My opinion, therefore, is that a county board of public instruction has no power to compensate a teacher in any amount who is on personal leave because of illness after such teacher's sick leave allowance has become exhausted, and I must answer your second question in the negative.

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July 6, 1942.—042-337.

TEACHERS—MILITARY LEAVE OF ABSENCE

QUESTION: Is there any provision in the School Code or any regulation of the State Board of Education which provides that a teacher may secure a leave from the instructional staff if he or she has been called to a Civil Service duty in the Air Corps for the duration of the war?

To Hon. Colin English, State Superintendent of Public Instruction:

There is no regulation of the State Board of Education relating to this problem, but Section 539 of the School Code, as amended, provides for leave of absence to any teacher called into "military, naval or other service in defense of his country." If what you describe as "Civil Service duty" is "military, naval or other service in defense" of our country, then such teacher would be entitled to a leave of absence under Section 539 of the School Code. This makes it necessary for the county school board to determine as a matter of fact whether the civil service duty is of the character defined in this statute. I would suggest that this information be obtained directly from the governmental or military agency involved.

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August 8, 1941.—041-440.

TEACHERS—PENSIONS

QUESTION: Chapter 20914, Acts of 1941, which amends Chapter 14782, Acts of 1931, provides that a pension shall be paid to the widow from the date of death of her husband. In case death was several years ago, would the widow be entitled to receive a pension from the date of death or would she be entitled to a pension only from the effective date of the Act, or would she be entitled to receive a pension only from the date her application is approved?

Is the Act applicable to widows whose husbands died before the Act became effective or is it applicable only to widows whose husbands died after the Act became effective?

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To Hon. Bryan Willis, Actuary, Teachers' Retirement System:

Section 1 of Chapter 20914, reads in part as follows:

"When any teacher drawing pension under this Chapter shall die leaving surviving a widow to whom such pensioner has been married for a continuous period of at least ten years immediately prior to his death, and from whom no divorce is obtained, such widow, upon proof of marriage to and continuation of marriage for the minimum period with, and death of, her said husband, shall be granted a pension payable from the date of the death of her said husband, at the same time and rate as other pensions paid under this Chapter. The Comptroller is hereby authorized and directed to draw his warrants in payment of such pensions so long as such widow shall remain unmarried and continue to be a resident of the State of Florida, provided, however, that nothing herein contained shall be so construed as to allow such pension to be paid to any widow where such widow of a deceased pensioner under this Act receives a like pension in her own right as a retired school teacher."

In my opinion the Act is applicable to widows whose husbands died either before or after the effective date of the Act, but in the case of a widow whose husband died before the Act became effective such widow would be entitled to receive a pension only from the effective date of the Act.

COUNTY SCHOOL OFFICERS AND PERSONNEL

September 15, 1941.—041-529.

TEACHERS—QUALIFICATIONS

QUESTION: May a County Board of Public Instruction prescribe qualifications for teachers, such as maximum age limit for teachers, which must be observed by the District Trustees in making nominations?

To Hon. Colin English, State Superintendent of Public Instruction:

This question should be answered in the affirmative.

Section 423 (Sub-section 7) of the Florida School Code authorizes the County Board of Public Instruction to "prescribe qualifications" for teachers. Section 504 of the Florida School Code provides:

"The County Board of any county may, in addition to and not inconsistent with qualifications prescribed by law or by regulations of the State Board, prescribe those qualifications for any or all positions which, in the opinion of the County Board, will best promote progress in the public school system of the county."

The word "qualifications" means "requisites" when used in the sense indicated in Section 504 of the Florida School Code. Accordingly, the specifying of a maximum age limit for teachers would be the prescribing of qualifications.

The question arises, of course, as to whether the prescription of a qualification establishing a maximum age limit, for instance sixty-five years, for teachers is inconsistent with qualifications prescribed by law or by regulation of the State Board of Education. Investigation reveals that there is no regulation of the State Board of Education which is inconsistent with such an age limit qualification.

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While the Teachers Retirement Act provides for voluntary retirement and for termination of obligatory contributions at the age of sixty years, and does not provide for compulsory retirement until the age of seventy years is reached, it is not the purpose of this Act to establish the qualifications of teachers and, therefore, the provisions of the Retirement Act should not be interpreted as being inconsistent with the County School Board's prescription of a maximum age qualification.

A minimum age of twenty years is established by Section 503 of the Florida School Code as a qualification for teachers, but the establishment of a maximum age qualification is evidently left to the sound discretion of the State Board of Education or to the County Board of Public Instruction.

Section 504 of the Florida School Code, providing that additional qualifications established by the County School Board must be such as will, in the opinion of the Board, "best promote progress in the public school system of the County," requires that any qualifications prescribed by the County School Board must be reasonable, not arbitrary, and not adopted solely for the purpose of affecting a particular individual.

A former opinion of this office makes clear that the District School Trustees must nominate persons possessing qualifications as required by regulations of the County Board of Public Instruction, since if this were not true, the powers conferred upon the School Board to prescribe the qualifications of school employees could be nullified. (Opinion of the Attorney General of Florida, February 27, 1940.)

COUNTY SCHOOL OFFICERS AND PERSONNEL

January 7, 1942.—042-2.

TEACHERS—REVOCATION OF CERTIFICATE

QUESTION: With particular reference to the case of Frank G. Sturchio, has the State Board of Education the power to revoke for cause certificate to teach?

To Honorable Spessard L. Holland, Chairman, State School Board:

To Honorable Colin English, State Superintendent of Public Instruction:

The Florida School Code, Section 308, Paragraph 16, invests the State Board of Education with power to revoke teachers' certificates to be exercised as "authorized in the School Code." The School Code permits the State Board to exercise this power only in cases where the holder is charged with having secured a certificate by fraudulent means, or has proven to be incompetent, unsuccessful, or guilty of gross immorality, or has otherwise violated any provisions of the School Code, for which the penalty of revocation of certificate is provided, which in my opinion limits the revocation scope powers of the State Board to the five different express cases, namely:

- (1) Where the holder is charged with having secured the certificate by fraudulent means.
- (2) Where the holder is charged with being incompetent.
- (3) Where the holder has proven to be unsuccessful in doing the teaching work.
- (4) Where the holder is guilty of gross immorality.

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(5) Where the holder has otherwise violated any provisions of the School Code, for which the penalty of revocation is provided.

The enumeration of these grounds for revocation in the School Code is held to exclude revocation by the State Board on any grounds other than those so enumerated. It is admitted in the Sturchio case that the cause offered for his cancellation of license is not any one of these five.

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February 6, 1942.—042-56.

TEACHERS—REVOCATION OF CERTIFICATE

QUESTION: Has the State Board of Education the power to revoke certificate to teach?

To Honorable Colin English, State Superintendent of Public Instruction:

Mr. Frank Sturchio, who is allegedly not a citizen of the United States, was issued a special teacher's certificate after Section 517 of the School Code became effective, which section requires that to be eligible for a teacher's certificate one must be a citizen of the United States.

Such a certificate, which is in effect a license to teach, may be revoked for any reason that would have justified a refusal to issue it in the first instance (37 C. J. 247). Inasmuch as the power to revoke a certificate on such ground is not vested in any other authority by statute, it is my opinion that such power is vested in the state superintendent of public instruction, who is vested with the authority to issue teacher's certificates, by Section 517 of the School Code.

If, after careful investigation, you conclude that Mr. Sturchio is not a citizen of the United States, I think that the proper procedure would be for you to notify him that the special certificate issued to him is suspended and that unless he can, within a specified time, adduce satisfactory evidence that he is a citizen of the United States, such certificate will be revoked absolutely.

COUNTY SCHOOL OFFICERS AND PERSONNEL

December 7, 1942.—042-547.

TEACHERS—REVOCATION OF CERTIFICATE

QUESTION: May the State Board of Education revoke the certificate of a teacher who leaves his position and subsequently resigns without permission or approval from the county superintendent or the county board of public instruction during the term covered by his contract?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 528 School Code provides: "Any certificate may be revoked by the State Board, after a hearing . . . provided that it be made to appear to the State Board that the holder has secured the certificate by fraudulent means, has proved to be incompetent, unsuccessful, or guilty of gross immorality, or has otherwise violated any provisions of the School Code for which the penalty of revocation of certificate is provided."

Section 308 (16) School Code provides it is the duty and responsibility of the State Board "to revoke for cause the certificate, permit or license issued to any teacher . . ." after notice in writing to the holder

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of the certificate of the charges brought, and an opportunity given to be heard in his own defense.

Under Section 509 (1) School Code it is the duty of a teacher to "teach efficiently and faithfully." The several provisions of the Code relating to leave of absence, approval for which is required by the county superintendent, and the authority of the county board to regulate such leaves (§539, §540, §542 and §543), clearly indicate the importance given by the law to attendance by a teacher.

Further, it is the duty of the teacher to cooperate with school officials in the enforcement of school laws and state and county regulations (§509(7)) and to conform to all rules and regulations of the county board (§509 (9)) and to fulfill the terms of the contract of employment (§509 (13)).

In accepting and acting under a certificate the teacher accepts and agrees to the statutory provisions relating to revocation thereof.

The conduct of one who leaves his teaching position without notice or without permission or approval of the county superintendent or the county board in violation of the aforementioned sections, is not in accordance with the general purposes of the School Code to insure the maintenance of schools, courses, classes and services adequate to meet the educational needs of the state, and may constitute "cause" for revocation of the teacher's certificate.

The duty of the county superintendent to recommend the revoking of any certificate for good cause (§433 (21)) and the duty of the state superintendent under §317 (16) to recommend the revocation of a certificate for cause based on evidence assembled, indicate that "good cause" is not limited to the specific matters mentioned in §528 as a basis for revocation.

It is my opinion that the State Board of Education, after giving written notice of at least ten days to the holder of the certificate with a statement of the charges against him, and after giving him an opportunity to be heard in his own defense, may revoke the certificate of a teacher who leaves his position without permission or approval from the county superintendent or compliance with the rules and regulations of the county board governing leaves of absence, on his failure to show good cause for leaving his teaching position and his failure to comply with above cited laws.

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February 5, 1942.—042-70.

TEACHERS—SICK LEAVE—COMPUTED

QUESTION: (1) Is a county school board required to pay a teacher for sick leave earned during the period prescribed in the law in some county other than the county in which he is teaching, or is this optional with the board of the county in which the teacher is located?

(2) May a teacher be paid for all cumulative leave earned in counties other than the one in which he is teaching, or does the provision that half of the cumulative leave must be earned in the same county mean that a teacher cannot be paid for a larger amount of cumulative leave earned in other counties than the amount earned in the county in which he is teaching?

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(3) If a teacher has earned and not used five days of cumulative leave in a county in which he is teaching and ten days in other counties, would he be entitled to be paid for a maximum of fifteen days of sick leave during the year?

To Hon. Colin English, State Superintendent of Public Instruction:

(1) Section 540 of the School Code provides that "any member of the instructional staff employed in public schools of the State who is unable to perform his duty in the school because of illness . . . shall be granted leave of absence for sickness by the County Superintendent, or by someone designated in writing by him to do so." The amount of such leave and its accumulation are precisely prescribed.

This language indicates that there is no option regarding the allowance of sick leave and that the county school board must pay a teacher for sick leave taken even though part of such sick leave may have been earned in another county, providing the amount does not exceed that prescribed in Section 540 of the School Code, which is further elaborated in my answer to your second and third questions herein.

(2) Section 540 of the School Code, after providing for the accumulation of sick leave, states that "at least half of this cumulative leave must be established within the same county school system."

In my opinion, the word "same" in this provision refers to the county school system in which the teacher is teaching at the time the sick leave is claimed. The only object of such a provision would seem to be to protect the county board against being liable for a large accumulation of sick leave on the part of a teacher who has recently joined the school system of that county.

Accordingly, my opinion is that a teacher cannot be paid for a larger amount of cumulative leave earned in other counties than the amount earned in the county in which such teacher is teaching. I wish to add, however, that inasmuch as Section 540 of the School Code provides that each member of the instructional staff shall be entitled to not more than five days of sick leave during any year, which shall be cumulative, and inasmuch as such sick leave may be taken at any time after the beginning of the school year, it is my opinion, for the purposes of this section, that a teacher accumulates five days of sick leave as soon as the school year begins. Hence, if such teacher has a sufficient accumulation of sick leave before coming to the present county, such teacher could, during the first year, claim ten days of sick leave, including the five days earned in the county in which such teacher is now teaching, but no more.

(3) In accordance with my answer to the second question, if a teacher has accumulated only five days' leave, including the current year, in the county in which such teacher is teaching, the teacher would be entitled to only five days of the leave accumulated in other counties, or a total of ten days.

Obviously, as a teacher accumulates more sick leave in the county in which the teacher is now teaching, such teacher will be entitled to a greater amount of sick leave accumulated in other counties, provided that not more than twenty days' sick leave will be recognized, and provided that sick leave credit may not be claimed later than the third year after being earned, as prescribed in Section 540 of the School Code.

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February 25, 1942.—042-96.

TEACHERS—SICK LEAVE—COMPUTED

QUESTION: (1) Is sick leave ever cumulative for prior years other than just the preceding three years?

(2) How many days sick leave would a teacher be entitled to in 1940 who had not claimed any sick leave in 1933-34, 1934-35, and 1935-36, but had claimed three days in 1936-37, no days in 1937-38, and one day in 1938-39?

(3) To how many sick days' leave would a teacher be entitled during 1939-40 who had claimed no days in 1934-35, none in 1935-36, three in 1936-37, ten in 1937-38, and seven in 1938-39?

To Honorable Colin English, State Superintendent of Public Instruction:

(1) Since sick leave can be accumulated for a total of four years only, including the current year, when sick leave is claimed it should be deducted by beginning with the earliest year of years of the accumulation.

(2) The teacher had not claimed any sick leave in 1933-34, 1934-35, 1935-36, but claimed three days in 1936-37, none in 1937-38 and one day in 1938-39. Assuming that this teacher began teaching in 1933, or had accumulated no sick leave prior thereto, such teacher would have been entitled to a total of twenty days of sick leave in 1939-40.

(3) The teacher claimed no sick leave in 1934-35 and 1935-36, but claimed three days in 1936-37, ten days in 1937-38 and seven days in 1938-39. Assuming that this teacher began teaching in 1934, or had accumulated no sick leave prior thereto, such teacher would have been entitled to ten days of sick leave for the year 1939-40. Had such teacher been teaching prior to 1934 and claimed no sick leave during the year 1933-34, the teacher, under these same circumstances, would have been entitled to thirteen days of sick leave for the year 1939-40.

If a teacher had taught for four successive years prior to and including the year 1938-39 without absence on account of illness, with the year 1938-39 he would have accumulated twenty days of sick leave. If he was absent on sick leave five days in 1939-40, at the beginning of the year 1941-42 he would still be entitled to twenty days' sick leave since the five days during which he was absent in 1939-40 should have been charged against the year 1936-37. If he was absent ten days on sick leave 1940-41, at the beginning of the year 1941-42 he still would have been entitled to fifteen days of sick leave because the ten days of absence in 1940-41 would have been charged against the years 1937-38 and 1938-39.

COUNTY SCHOOL OFFICERS AND PERSONNEL

May 10, 1941.—041-250.

TEACHERS—TRANSFER

QUESTION: (1) Under Section 433 (7-h) of the School Code (Chapter 19355, Laws of Florida, Acts of 1939), can a transfer of teachers between schools within the district be made upon recommendation of the county superintendent, and with the approval of the county board, without obtaining the consent of the trustees?

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(2) Must the consent of the trustees of the district to which the teacher is to be transferred be obtained, if it is proposed to transfer the teacher to a school in another district, without the necessity of obtaining the consent of the trustees of the district from which the teacher is to be transferred?

To Hon. Colin English, Superintendent of Public Instruction:

Both questions should be answered in the affirmative.

Section 433 (7-h) provides that the county superintendent shall have the duty to "recommend employees for transfer and to transfer any employee during any emergency and report the transfer to the County Board at its next regular meeting: Provided that, if the school to which the transfer is to be made is a district school and is located in another district from the one in which the employee was previously serving, the consent of the trustees shall be obtained, as provided herein, before the transfer is made; and to recommend capable employees for promotion and advancement."

Section 423 (7-h) provides that the county board of public instruction shall have the power and duty to "act on recommendations of the County Superintendent regarding transfer and promotion of any employee, subject to the provisions of Article 4 of this Chapter of the School Code."

Section 443, which is found in Article IV of the School Code, provides that the trustees shall have power to "consider recommendations of the district supervising principal or the principals of the schools in the district and the County Superintendent regarding the nomination of teachers and other members of the instructional staff and other personnel to serve in the district schools and to make nominations for such positions to the County Board . . ."

The intention of the Legislature seems to be manifest from these provisions, that the consent of the trustees of a school district to a transfer of teachers between schools is only required when a teacher is transferred into such district from a school outside of such district.

CHILD WELFARE

December 10, 1942.—042-556.

SCHOOL ATTENDANCE LAW—ENFORCEMENT

QUESTION: Who has the responsibility in Florida for the enforcement of the compulsory school attendance law?

To Honorable Spessard L. Holland, Governor:

School attendance is dealt with by Ch. 232 Fla. St. '41 (Ch. VI, School Code). All children between the ages of seven and sixteen years are required to attend school (§232.01). Each parent of a child within the compulsory attendance age is responsible for the child's school attendance (§232.09); absence from school must be explained (§232.10).

The school attendance assistant, if one has been appointed, has the duty of investigating unexcused absences (§232.18 (2) (b)). If no attendance assistant is employed, the county superintendent exercises the duties and powers of attendance assistant; and the county superintendent is responsible for the enforcement of the law (§232.16).

Under direction of the county superintendent a written notice shall be given either in person or by registered mail, requiring the child's at-

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tendance in school within three days of the date of notice. If the notice is disregarded, the county superintendent shall institute criminal proceedings against the parent, guardian or other person having control of the child (§232.18 (2) (c)).

Court procedure and penalties are provided for by §232.19, paragraph 5 of which further provides that the proceedings may be begun by the county superintendent, an attendance assistant, the probation officer of the county, an officer of any court of competent jurisdiction, or by a duly authorized agent of the state superintendent; and paragraph 6 of said section provides the penalties for failure to comply with the law.

CHILD WELFARE

September 25, 1942.—042-463.

SCHOOL ATTENDANCE LAW—JURISDICTION AND JUVENILE COURTS

QUESTION: Do juvenile courts have the power to enforce penalties against parents who refuse or fail to have their children attend school regularly as prescribed?

To Honorable Colin English, State Superintendent of Public Instruction:

Until such time as the legislature authorizes and provides for a procedure in and by juvenile courts, extending in juvenile courts constitutional rights and privileges such as the right to trial by jury to the accused, I do not believe that juvenile courts have authority to try misdemeanors as defined in Paragraph (6), sub-paragraph (a) of Section 619 of the present Florida School Code.

Prosecutions under the provisions of Paragraph (5) of Section 619 may be begun by the county superintendent, by an attendance assistant, by the probation officer of the county, by the executive officer of any court of competent jurisdiction, or by a duly authorized agent of the State Superintendent, and should, of course, be begun upon affidavit charging the offense and a warrant issued by the proper court such as a J. P. or County Judge, or upon information by the prosecuting officer of the court where the procedure in the particular county or court would permit.

CHILD WELFARE

April 8, 1942.—042-162.

SCHOOL BUSES—TRAFFIC REGULATIONS

QUESTION: (1) A school bus is approaching the place where school children are picked up and unloaded by the bus. While approaching the stopping place, the bus driver displays his stop signal, said display being made some fifty or more feet before getting to the stopping place. While the school bus is slowing down to stop and while the stop signal is displayed, a person driving an automobile passes the school bus. Can the driver of the automobile be prosecuted under Section 804 of the Florida School Code, for a violation thereof when the facts set forth above exist? In other words, does a motorist have to stop when he sees a stop signal displayed by the driver of the school bus, even though the bus is in motion as shown above?

(2) A school bus has stopped to unload children, has his stop sign displayed. A motor vehicle passes the bus while unloading the children. When the vehicle passes it goes so fast that the driver of the bus cannot recognize the driver, but gets the license number of the vehicle as it passes. The bus driver then gets the name of the owner

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of the motor vehicle that passed him, but does not know whether or not it was the owner who was driving the vehicle at the time the school bus was passed. Can the bus driver prosecute the owner for passing his bus and identify the owner merely by having the license number? In other words, is the owner of a motor vehicle responsible for the violations of the motor laws by his motor vehicle when not actually operating or driving same himself, the only identification being by the license number which designates the owner and can be obtained from the Motor Vehicle Department?

To Hon. Colin English, State Superintendent of Public Instruction:

- (1) Section 804 of the Florida School Code provides:

"Any person using, operating, or driving a motor vehicle upon or over the roads or highways of the State of Florida, upon approaching any school bus used in transporting school pupils to or from school, while such bus is stopped upon the roads or highways of the State, is hereby required to bring such motor vehicle to a full stop before passing such school bus: Provided that said bus is properly identified by being painted orange color with the words 'school bus' on front and back in black letters at least four inches high. If a stop signal which meets standard requirements prescribed by the State Board shall be displayed from the bus, said signal shall be due warning to the driver of any approaching vehicle that children may be on the highway and such vehicle shall not pass the school bus until the signal has been withdrawn. Any person failing to comply with the requirements of this Section or violating any of the provisions hereof shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed three hundred dollars (\$300.00) or by imprisonment in the county jail not to exceed ninety days, or by both fine and imprisonment in the discretion of the court."

The first sentence of this statute, including the proviso, relates to passing a school bus which has *stopped*. The second sentence requires traffic to stop whenever a school bus displays a stop signal meeting the standard requirements prescribed by the State Board of Education. The second sentence is not a part of the proviso of the first sentence and is not, therefore, restricted only to a bus which has stopped. In my opinion, therefore, traffic must stop when such a signal is displayed, even though the bus has not come to a full stop. Accordingly, the driver of an automobile under the circumstances you describe would be subject to prosecution under this statute if the signal displayed is one meeting the standard requirements prescribed by the State Board of Education.

(2) Neither at common law nor by statute is there any basis for subjecting a person in such circumstances to criminal liability simply because of his ownership of an automobile with which a violation of the law takes place. Other evidence would have to be adduced in order for prosecution to be successful. In my opinion, therefore, your second question must be answered in the negative.

SCHOOL PLANT

November 17, 1941.—041-651.

SCHOOL BUILDINGS—ADVERTISING AND CONTRACTING FOR IMPROVEMENTS

QUESTION: Section 931 of the Florida School Code relating to advertising for bids and awarding of contracts for buildings or improvements, provides: "... after plans for the work have been approved by the State Superintendent, the County Board, after advertising the same in the manner prescribed by law, shall award the contract for such building or improvements to the lowest responsible bidder." The State

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Superintendent of Public Instruction has been proceeding upon the assumption that "in the manner prescribed by law" as provided in said section, refers to Section 2191, C. G. L. 1927.

Is this assumption correct? Must a definite number of days elapse between the first and second advertising? Must any specified time elapse, after the second advertising, before bids may be opened?

To Hon. Colin English, State Superintendent of Public Instruction:

"... after plans for the work have been approved by the State Superintendent, the County Board, after advertising the same in the manner prescribed by law, shall award the contract for such building or improvements to the lowest responsible bidder."

Your assumption regarding Section 2191, C. G. L. 1927 is not correct. That statute relates only to contracts entered into by the board of county commissioners and is not a statute of general application any more than are similar statutes relating to the Board of Commissioners of State Institutions, the State Road Department, or other agencies.

The phrase "in the manner prescribed by law" in Section 931 of the School Code can have reference only to the general statute defining the type of newspaper in which a legal advertisement may appear, Section 4901, C. G. L. 1927, to the general statute concerning uniform affidavits for proof of publication of official public notices, which is Chapter 19290, Laws of Florida 1939, and to the rate chargeable for, and the size type used in, official notices, as prescribed by Chapter 20264, Laws of Florida, 1941.

Since these general statutes do not contain any provision relating to the number of times a legal notice must be published, my opinion is that a single publication of an advertisement under Section 931 of the School Code would be adequate.

Inasmuch as the object of Section 931 of the School Code is to obtain open and fair consideration by the county school board of all bids submitted by all persons desiring to submit a bid, the Legislature in enacting this provision, must have contemplated that a reasonable time would elapse between the date of the advertisement and the opening of the bids submitted, in order to allow prospective bidders sufficient time for preparation of bids.

Section 307 (2) of the Florida School Code provides that the State Board of Education shall adopt and prescribe all needful rules and regulations for the proper enforcement and the carrying out of the School Code. Accordingly, the State Board of Education may provide the detailed procedure for advertising for bids which must harmonize, of course, with Section 931 of the School Code and the statutes mentioned above. The State Board of Education may, for instance, prescribe the number of times that an advertisement, under Section 931 of the School Code, should be published, and it may also provide for the period of time that must elapse between the last publication of such advertisement and the opening of the bids submitted pursuant thereto.

SCHOOL PLANT

April 18, 1941.—041-203.

SCHOOL SITES—SALE OF LIQUOR

QUESTION: When a school located in Key West, Florida, is on property owned by the Cuban Government and all the teachers are paid

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by the Cuban Government, with the exception of one, who is paid by Monroe County under a special act of the legislature, can a license be issued for the selling of liquor to a place of business operating nearer than three hundred feet to such school site?

To Hon. E. W. Scarborough, Director, Beverage Department:

We have agreed that the Beverage Act is not involved, but that Section 922 of Chapter 19355, General Laws of Florida, Acts of 1939, known as the School Code, must be taken into consideration, because the Beverage Department cannot issue a license that would be in violation of any of the laws of the State of Florida. The above referred to Section of the School Code provides:

"No place at which liquors are sold, gambling devices are provided, or other features classed under regulations of the State Board as detrimental to the moral or physical welfare of children shall be located nearer than three hundred feet to any school site."

The School Code by Sub-section 8 of Section 118 of Chapter 19355, supra, defines the word "school" as follows:

"A school is an organization of pupils for instructional purposes into classes or grades at any school center on an elementary, a high or secondary school, or other public school level approved by and under regulations of the State Board."

I think it was clearly intended by Section 922 of our School Code to protect and safeguard pupils attending schools from the effects of the recognized evils of the places mentioned therein, and I am of the opinion that the definition of a school given in the Act covers any school regardless of whether or not it happens to be upon property owned by a foreign government so long as the school is operated "for instructional purposes," and constitutes either "an elementary, a high or secondary school," and the one you have described certainly is within this definition.

I also note that one teacher is paid by Monroe County under a special Act of the Legislature. The Legislature apparently recognized that this school as such was of some value to the general public of Monroe County; otherwise, the public funds of this county would not be used to provide a teacher in this school.

I, therefore, am of the opinion that this school is entitled to the protection and benefit of any of the laws of the State of Florida that are designed for that purpose, and hold that you should not issue a license under the Beverage Act where the licensee would conduct a place of business, the location of which would be "nearer than three hundred feet" to such school site.

FINANCE AND TAXATION

March 4, 1941.—041-111.

COUNTY BOARD OF PUBLIC INSTRUCTION—BONDS—LIABILITY FOR INTEREST AFTER MATURITY

QUESTION: Is the Board of Public Instruction of Walton County liable for interest on bonds after maturity from the date of the original rulings of the Attorney General's office, or from February 14, 1941, the date of issuance of opinion to A. N. Anderson, Department of Public Instruction, DeFuniak Springs, Florida?

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To A. N. Anderson, Esquire, Department of Public Instruction, DeFuniak Springs, Florida:

The date of the issuance of our opinions can have no effect, of course, as to the ultimate question of liability for interest after maturity of negotiable bonds of the Board of Public Instruction, for our opinions do not have the force of law, but are interpretations of what we believe to be the correct law. Even though a Board is liable for such interest, the right to such interest may be waived by the holder of a bond if he does not insist upon the payment of the interest. If he does insist upon the payment of such interest, the Board cannot be legally required to pay such interest until the claim for interest is reduced to judgment.

This does not, however, alter our view that a Board of Public Instruction can be made ultimately liable for interest after maturity on its negotiable bonds.

FINANCE AND TAXATION

September 2, 1941.—041-493.

COUNTY BOARD OF PUBLIC INSTRUCTION—CHANGE IN MILLAGE

QUESTION: After the Board of Public Instruction has certified to the Board of County Commissioners the millage required to be levied under a properly adopted budget that has been approved by the State Superintendent of Public Instruction as prescribed by law, do the County Commissioners have any right to raise or lower such certified millage because they do not agree with the wisdom of any of the expenditures or the amount of same to be raised by such millage?

To Hon. Colin English, State Superintendent of Public Instruction:

I wish to advise that under the circumstances mentioned above, I am of the opinion that the Board of County Commissioners can neither raise nor lower the millage fixed by the County Board of Public Instruction. See *State v. Board of Public Instruction for Dade County*, 170 So. 602, text page 607; *Tomasello v. Board of Public Instruction for Santa Rosa County*, 45 So. 886; *State ex rel. Gibson v. Bernal et al.*, 138 So. 380.

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May 2, 1942.—042-211.

DISTRICT SINKING FUNDS—BONDS—PURCHASE

QUESTION: Does Section 1055 of the School Code prohibit or permit the purchase of bonds of a school district with the sinking fund of that same district?

To Honorable Colin English, State Superintendent of Public Instruction:

Section 1055 of the School Code does not permit or prohibit the purchase of bonds of a particular school district with the sinking fund of that district. It is, therefore, a matter that should be very carefully controlled by a regulation of the State Board of Education.

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May 30, 1941.—041-299.

DISTRICT SINKING FUNDS—INVESTMENT

QUESTION: (1) May investments of the sinking fund set aside for the retirement of any bonds in a school district be made in serial bonds when a district has a sinking fund for bonds issued under previous laws and when the particular serial bonds which are purchased mature

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before the sinking fund will be needed to retire bonds of the purchasing district?

(2) When a district has a balance not needed for retiring serial bonds with irregular maturities, may serial bonds of another district be purchased when the maturities are such as to make available funds at the time they are needed to retire the bonds of the purchasing district?

(3) May the sinking funds of any district be invested in county school bonds or time warrants which have been issued in accordance with law, when all other conditions prescribed in such section have been met?

To Hon. Colin English, State Superintendent of Public Instruction:

Section 1055 of the Florida School Code provides:

"The County Board shall have power at all times to invest the sinking fund collected for the retirement of any bonds of any school district in the bonds of another school district of the same county; Provided that the said bonds shall be purchased at par or less, and the County Board shall have further right to invest the sinking fund of any district in any general county bonds of the same county: Provided that the said bonds shall be of such date and maturity that they will mature on or before the date of the maturity of the district's bonds, with whose sinking fund they have been purchased: and Provided, further, that it shall be the duty of the County Board before investing the sinking fund as herein provided to secure the opinion of the Attorney-General of the State of Florida, approving the legality and validity of the bonds to be so purchased, and no bonds shall ever be purchased by any County Board which have not been entirely and fully approved by the opinion of the Attorney-General as herein provided: Provided always that the County Board shall have the right to keep the sinking fund on deposit earning the rate of interest agreed upon until such time as in their judgment they may be able to invest it in bonds to better advantage as herein provided for."

The first two questions which you ask should be answered in the affirmative. The evident purpose of the provision in Section 1055 that the bonds purchased should be of such date and maturity that they will mature on or before the date of the maturity of the bonds of the districts with whose sinking funds they have been purchased, is to preserve the liquidity of the sinking fund, in order to take care of the purchasing district's bonds when they mature, and the conditions you state in your first two questions appear to be in conformance with such purpose.

Your third question should be answered in the negative.

Section 1055 as above quoted provides that the sinking fund in question may be invested in "any general county bonds" of the county, which language does not appear to embrace county school bonds or time warrants,

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April 24, 1941.—041-217.

ELEMENTARY SCHOOLS—DETERMINATION OF INSTRUCTION UNITS

QUESTION: In an elementary school with less than forty pupils, regardless of the number of teachers, should the number of instruction units be computed in accordance with Section 1004 (1)-(a) of the School

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Code, or should the fractional part of two units be used for any school having less than forty pupils because of the fact that two teachers have been employed for that particular school?

To Hon. Colin English, State Superintendent of Public Instruction:

Section 1004 provides in part as follows:

"Section 1004. Procedure for Determining Number of Instruction Units for Instructional Personnel.—The number of instruction units for instructional personnel in each county shall be determined from the average daily attendance in the county for the preceding year in the following manner:

(1) **ELEMENTARY UNITS.**—The Elementary instruction unit for instructional personnel shall be calculated as follows for each county:

(a) In a one-teacher elementary school one unit shall be counted for an average daily attendance of thirty or less pupils. For an average daily attendance of more than thirty pupils one unit shall be counted for the first thirty pupils and the fractional part of one unit for the number above thirty in average daily attendance.

(b) In a two or more teacher elementary school with an average daily attendance of less than three hundred, two units shall be counted for the first forty pupils in average daily attendance and one unit for each additional thirty-five pupils or major fraction thereof."

In my opinion, in an elementary school with less than forty pupils, the number of instruction units should be computed in accordance with sub-paragraph (a) of the provision above quoted, regardless of the number of teachers. It cannot be denied that the School Code in this provision is somewhat inconsistent or deficient, for Section 1004 makes no express provision as to elementary schools with less than forty pupils, but with two or more teachers.

In an opinion of this office dated August 30, 1939, and reported in the Biennial Report of the Attorney General, 1939-1940, page 148, to which opinion you refer, it was held that sub-paragraph (2)-(a) of Section 1004, providing that two units shall be counted for the first thirty pupils in a Junior High School, did not apply to a Junior High School with less than thirty pupils in daily attendance, and so the basis for computation was that contained in sub-paragraph (1)-(a) of Section 1004 above quoted, referring to elementary units.

By the same reasoning, I believe that in the case you propose, where the average daily attendance is less than forty pupils, sub-paragraph (1)-(a) of the Section provides the proper basis.

These provisions do not seem to contemplate that there shall be more than one teacher in schools having less than forty pupils, and the requirement that there be at least forty pupils before sub-paragraph (1)-(b) is in effect, probably overcomes the division between the sub-paragraphs on the basis of the number of teachers in the particular school.

As I have said before, however, the statute is not consistent or clear with reference to situations like that you present.

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November 13, 1942.—042-516.

INSTRUCTION UNITS—COMPUTATION

QUESTION: What effect, if any, does Section 7, Chapter 20970, Acts of 1941, have upon the determination and apportionment of instructional units?

To Honorable Colin English, State Superintendent of Public Instruction:

The School Code as originally enacted made no provision for the allocation of a senior high school instruction unit where the average daily attendance was less than 35 pupils or of a junior high school instruction unit where the average daily attendance was less than 30 pupils.

However, Sec. 1003 of the School Code relating to the determination and apportionment of instruction units was amended by Sec. 7, Ch. 20970, Acts of 1941 (Sec. 236.03 Fla. St. '41) by adding thereto in part the following: "Provided that the State Board shall determine by regulations the bases for classifying small schools and special courses for the purposes of computing instruction units."

It is my opinion that this amendment authorizes the State Board of Education to adopt regulations classifying high schools with daily average attendance of less than 35 pupils for the computing and apportionment of a high school instruction unit of such school; and that such rule also applies to the apportionment of a junior high school instruction unit to a junior high school with average daily attendance of less than 30 pupils.

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July 15, 1941.—041-382.

INSTRUCTION UNITS—DETERMINATION FOR TRANSPORTATION

QUESTION: Is the following procedure correct in the determination of instruction units for transportation when a school or department is to be discontinued?

To Hon. Colin English, State Superintendent of Public Instruction:

(1) Instruction units which would have been allowed for the small schools had they been continued are to be transferred to transportation and counted as instruction units for transportation for that one year on application of the County Board.

(2) Instruction units for instructional salaries are to be determined on the basis of the organization of the school after the proposed reorganization has been effected. That is, if six one-teacher schools are consolidated into an elementary school of one hundred pupils, the instruction units for instructional personnel are to be determined by counting two units for the first forty pupils and one unit for each additional thirty-five pupils in average daily attendance in accordance with the provisions of Section 1004.

Section 1005, as amended, provides in part that

"... in the event the County Board reports that a school or department is to be discontinued the following year and the pupils of said school or department are to be transported to another school, the units which otherwise would have been allowed for instructional personnel may, for the following year only, upon application of the County Board, be allowed as instruction units for transportation."

It is my opinion that the above procedure outlined is correct.

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July 3, 1942.—042-332.

SALARY WARRANTS—ASSIGNMENT

QUESTIONS: (1) Whenever a salary warrant is assigned by a school teacher to some individual and/or corporation as payment for a debt, can that warrant be delivered to the assignee after said assignor requests release from said assignment?

(2) Must said warrants be delivered to assignor after return or repossession of property for which assignment was made?

To Hon. Colin English, State Superintendent of Public Instruction:

(1) Whether the warrant should be delivered to the assignee after the assignor requests release from the assignment depends upon whether a contract of assignment still exists between the assignee and assignor. Many factual elements must be considered in determining whether a valid and enforceable assignment exists. Inasmuch as action by the county board in such a situation is likely to result in litigation, I think that this question can be answered safely only by the attorney for the county board who would have to defend the board in case litigation arose against it. Because of the nature of this question and the failure to set forth the facts in detail, I am not able to give a more definite answer to this question.

(2) In this state repossession of property sold on a conditional sales contract extinguishes the debt for the unpaid purchase price. If, therefore, the assignment of the teacher's salary was made to secure the payment of the purchase price, nothing further would be due by the assignor on the purchase price, after repossession of the property by the seller. Accordingly, salary warrants should be then delivered to the assignor instead of to the assignee, provided the original assignment was made to embrace only the purchase price.

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September 2, 1941.—041-496.

SCHOOL DISTRICTS—BONDS—ADVERSE ELECTIONS

QUESTION: In a number of school districts during recent years bond elections have been held in which practically all of the persons voting were in favor of the bonds but the elections did not carry because an insufficient number of persons participated. Under Section 1042, Chapter 19355, Acts of 1939, would it be possible to hold another bond election in such district at the time of the regular school district election in November, on the assumption that the election which had just been held was not adverse to the issuance of the bonds but failed because an insufficient number of persons participated?

To Hon. Colin English, Superintendent of Public Instruction:

Section 1042 provides:

"If the result of the said election shall be adverse to the issuance of said bonds, no election shall be held for such purpose within one year thereafter."

This exact question was decided by the Florida Supreme Court in *State ex rel. Evans v. Barker*, 121 Fla. 350, 163 So. 695, in which the Court construed the language of Section 726, Compiled General Laws, which is identical with the quoted language in Section 1042 of the School

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Code. In that case at a special tax school district bond election a majority of the freeholders who were qualified electors residing in the district did not participate according to the court "so the election was abortive of result." The Supreme Court then said:

"The question now presented to this court in mandamus proceedings is whether or not section 726, C. G. L., supra, prohibits the calling and holding of another bond election in the district within one year after the former election, which, as has been said, was constitutionally ineffective for the purpose for which it was held, for the reasons hereinbefore pointed out.

"Our conclusion is that the statute only prohibits a second election within one year if the first election is adverse. An 'adverse' election comprehends something more than an abortive or ineffectual election. The word 'adverse' has been employed by the Legislature to express its intent, and such word must be given its usual and ordinary meaning which is, 'Acting in opposition to, actively hostile.' See Shorter Oxford English Dictionary, page 28; New Merriam-Webster International Dictionary, page 38. It follows therefore that an election from which no actively hostile result can be ascertained is not an 'adverse' election within the meaning and intent of section 726, C. G. L., supra, but is merely an inchoate or abortive election the result of which is a legal brutum fulmen."

To the same effect see *Dixon v. City of Miami*, 126 Fla. 249, 170 So. 845.

Under these decisions then it is possible to hold another bond election under the circumstances which you describe.

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July 24, 1941.—041-398.

SCHOOL DISTRICTS—BONDS—ISSUANCE

QUESTION: Under Section 1048 of the School Code (Chapter 19355, Acts of 1939) are bonds considered as issued when the resolution is adopted canvassing election returns and authorizing the issuance of the bonds and the date of the bonds, or at the time the bonds are actually printed and in physical condition?

To Hon. Colin English, Superintendent of Public Instruction:

Section 1048 provides as follows:

"When any school district shall be authorized and issues bonds in the manner provided for under the terms of this Article, such bonds shall be subject to validation in the manner provided for in Article VII, Chapter XI, Title III, Second Division of the Compiled General Laws."

Section 5106, C. G. L. 1927, which section is found in Article VII, Chapter XI, Title III, second division of the C. G. L., provides that when at an election the issuance of bonds is approved, and when any county, municipality, taxing district, or other political subdivision "shall adopt any ordinance or resolution, or take any other action required by law, for incurring any bonded debt or issuing certificates of indebtedness under the laws of this State" a petition may be filed in the Circuit Court to determine the authority to incur bonded debt or to issue certificates of indebtedness and the legality of all proceedings had or taken.

I find no intent in the School Code to require school districts actually to issue bonds, in the sense of printing the bonds and delivering

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them to purchasers, before validation proceedings may be undertaken, while all other taxing districts need only adopt an ordinance or resolution or take some other action for incurring a bonded debt or issuing certificates of indebtedness, before instituting validation proceedings. The identical language found in Section 1086 above quoted is also found in the previous statute—Section 740 of the C. G. L. 1927. Under that section school districts apparently instituted validation proceedings before actually printing and delivering their bonds. (See *Perry v. Consolidated Special Tax School District No. 4*, 89 Fla. 271, 103 So. 639; *Weinberger v. Board of Public Instruction*, 93 Fla. 470, 112 So. 253; and *Board of Public Instruction v. State*, 121 Fla. 703, 164 So. 697.) It seems therefore that school district bonds may be validated when the resolution is adopted canvassing election returns and authorizing the issuance of the bonds.

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August 18, 1941.—041-449.

SCHOOL DISTRICTS—BONDS—ISSUANCE

QUESTION: Are School Districts 4 and 5 of Broward County created under Chapter 21129, Special Acts of 1941, authorized to issue bonds jointly to build a high school in one district which high school is to serve both districts?

To Hon. Colin English, State Superintendent of Public Instruction:

Chapter 21129, Special Acts of 1941 provides that the qualified electors of Special Tax School Districts 4 and 5 of Broward County are empowered to authorize "a bond issue for the purpose of acquiring the site for and the building, furnishing and maintenance of a public free high school, to be erected in either or both of said districts as may be determined in the manner hereinafter provided." The Act provides further for the method of holding the election in each of the districts and for the administration of the said high school through joint sessions of the trustees of both districts.

This Act appears to provide for the joint issuance of bonds by the two districts whether the high school is to be erected in either or both of the districts, which high school is to serve both districts.

I call your attention to Section 17, Article XII, of the Florida Constitution, which provides that the Legislature "may provide for special tax school districts to issue bonds for the exclusive use of public free schools within any such special tax school district." But the spirit and intent of this provision, in my opinion, do not prohibit the Legislature from enacting a law like that here involved. However, it may be well to have this question determined by the courts in the validation proceedings.

FINANCE AND TAXATION

October 2, 1941.—041-563.

SCHOOL DISTRICTS—ELECTIONS—POLLING PLACES

QUESTION: (1) Is the County School Board required to use the polling places designated for general elections where located in districts involved in school elections, and what discretion does the Board have in designating polling places;

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(2) If several school districts are involved in an election under Section 1032.1 must there be a polling place designated for each original district involved in the election, even though in a general election there may not be regularly designated polling places in some of such districts.

To Hon. Colin English, State Superintendent of Public Instruction:

The county school board is not required to use the polling places designated for the general elections for any district school election, even though polling places used for the general elections may be located in some of the districts in which school elections are held. The county school board has full discretion in designating the polling places in each district as long as such polling places are reasonably accessible to the qualified voters of the district.

Sub-section (e) of Section 1032.1 of the Florida School Code provides that the procedure for calling and holding elections under this section "shall be the same as the procedure for calling and holding biennial school district elections . . ." Sub-section (2) (a) of Section 1032 of the Florida School Code, relating to the conduct of regular biennial school district elections, provides "all school district elections shall be held and conducted in the manner prescribed by law for holding general elections . . ."

Section 308, Compiled General Laws of Florida, 1927, relating to elections, provides "there shall be in each and every election district in each county one polling place." My opinion is, therefore, that in an election for the organization of a more adequate school district there must be a polling place designated in each of the districts involved in the election, even though in a general election there may not be a regularly designated polling place in some of such districts.

FINANCE AND TAXATION

October 29, 1941.—041-626.

SCHOOL DISTRICTS—ELECTION—QUALIFICATIONS

QUESTION: (1) Are persons holding contract for deed to land within the district but who have paid no taxes directly thereon although payments on contract figured to include taxes entitled to vote if otherwise qualified?

(2) Is person paying taxes on corporate property located in district entitled to vote if otherwise qualified?

To Hon. Colin English, State Superintendent of Public Instruction:

(1) Section 1032 of the Florida School Code provides that to be a qualified elector in school district elections a voter must, besides having certain other qualifications, "pay a tax on real or personal property within the district."

In the situation you describe, the vendor of the land retains legal title and pays the taxes in his own name. This cannot be considered payment of taxes by the contract purchaser, and my opinion, therefore, is that your first question should be answered in the negative.

(2) By "corporate property," I assume you mean property owned by a corporation. Inasmuch as a corporation is a legal entity, the payment of taxes on its property by anyone other than the corporation, even by a stockholder who is not an owner of the corporate property either legally or equitably, would not qualify such person to vote under Section 1032 of the School Code.

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October 30, 1941.—041-628.

SCHOOL DISTRICTS—MERGER—BONDS

QUESTION: Can debt-free school districts merging with bonded districts be forced later to help pay the latter's debts?

To Hon. Colin English, State Superintendent of Public Instruction:

Section 1032.1 (m) of the Florida School Code provides:

"If any school district included within the new school district has outstanding bonded obligations, the obligations of each such district shall continue as obligations against the area originally included in the school district for which the obligations were created. When any bonds are outstanding as prescribed herein, the County Board shall assume full responsibility for certifying the necessary tax levies and for arranging for payments on the obligations as they come due."

If any existing bonded indebtedness be refunded in the future, the refunding bonds would be considered as an extension of the existing bonded indebtedness and would continue as an obligation only against the area included in the district when and for which the original bonds were issued. It is my opinion, therefore, that your question should be answered in the affirmative.

FINANCE AND TAXATION

September 2, 1941.—041-568.

SPECIAL SCHOOL DISTRICTS—ORGANIZATION

QUESTION: In counties having only one high school would it be constitutional under Chapter 20691, Acts of 1941, for a county board to propose that the voters of that county vote on the organization of one special tax school district in the county, including the entire attendance area of the high school, which would, in such situations, include the entire county?

To Hon. Colin English, State Superintendent of Public Instruction:

In my opinion Article XII, Section 10, of the Florida Constitution is permissive in character in that it provides that "the Legislature *may* provide for the division of any county, or counties, into convenient school districts" (*italic is mine*). Therefore, a proposal by a county Board of Public Instruction under the provisions of Chapter 20691, Laws of Florida 1941, that the voters of a county vote on the organization of one special tax school district in the county including the entire attendance area of the one high school of the county would not contravene the Constitution of the State of Florida.

FINANCE AND TAXATION

July 24, 1941.—041-397.

SUPERVISOR OF INSTRUCTION—COOPERATIVE EMPLOYMENT

QUESTION: (1) Under the provisions of Section 1 of Chapter 20915, Laws of Florida, Acts of 1941, if two counties adopted a plan for cooperative employment of a supervisor of instruction, should an additional instruction unit be allowed to each county, provided the entire amount of \$1600.00 received by the two counties was used in the payment of a joint supervisor of instruction?

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(2) Does that Section permit County "A" to employ a white supervisor of instruction and receive an additional instruction unit and County "B" to employ a negro supervisor of instruction and receive an additional instruction unit with a cooperative arrangement for the use of both supervisors in both counties?

To Honorable Colin English, State Superintendent of Public Instruction:

(1) Section 1 in part provides:

"Each County Board of Public Instruction which employs for the purpose of improving instruction in the county one or more supervisors of instruction meeting the requirements prescribed by the State Board of Education and which adopts and carries out a plan for improvement of instruction in the county meeting the requirements prescribed by regulations of the State Board of Education shall be entitled to an additional instruction unit for each such supervisor of instruction employed in the county: Provided the number of additional instruction units to which each county is entitled for the employment of supervisors of instruction shall be determined as follows:

"(a) For the first one hundred (100) instruction units or fraction thereof in each county one instruction unit shall be allowed for a supervisor of instruction if employed: Provided that any two counties with less than one hundred (100) instruction units may adopt a plan for cooperative employment of a supervisor of instruction."

When two counties, with less than one hundred instruction units in each county, adopt a plan for cooperative employment of a supervisor of instruction, each of such counties is entitled to an additional instruction unit. This construction does not seem to be dependent upon the fact that the entire amount of \$1600.00 is used in the payment of the joint supervisor of instruction, so long as the two counties in good faith employ a supervisor of instruction for the purpose of improving instruction in the counties.

(2) I see no reason why one county cannot employ a white supervisor of instruction and a second county employ a negro supervisor of instruction with a cooperative arrangement for the use of both supervisors in both counties. However, as I construe Section 1, this arrangement would result in no more than one instruction unit for each of such counties.

FINANCE AND TAXATION

August 25, 1941.—041-483.

TEACHERS' SALARY FUND—DEPOSIT

QUESTION: Is the State Treasurer as Ex-Officio Treasurer of the Teachers' Salary Fund, permitted to accept money for deposit in this fund from sources other than the State Allocation and authorized loans?

To Honorable J. Edwin Larson, State Treasurer:

The State Treasurer is *permitted* to accept money for deposit in this fund from sources other than State allocation and authorized loans, but he is under no duty to do so. I understand that you are often confronted with a situation as follows, to-wit: A County School Board wishes to purchase a school bus and may have only five hundred dollars available in their General Fund for this purpose, while there are sufficient funds in the State Transportation Fund with which to buy the bus, and the County Board desires to forward the five hundred dollars to the State Treasurer so that it will require the drawing of but one warrant to pay

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for the bus. As I have heretofore stated, I find no prohibition in our law to prevent the State Treasurer from accepting such a deposit.

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December 10, 1942.—042-553.

TEACHERS' SALARY FUND—EXPENDITURE FROM INTEREST ACCOUNT

QUESTION: Can the cost of an abstract of title necessary to the foreclosure of a mortgage by the State Board of Education be paid from the interest account of the permanent school fund?

To Hon. Nathan Mayo, Commissioner of Agriculture:

Article XII, section 4, Florida Constitution, provides the interest of the state school fund shall be *exclusively applied to the support and maintenance of free public schools.*

What constitutes support and maintenance of public schools was defined in Board of Public Instruction v. Kennedy, 147 So. 250, 109 Fla. 153; however, since such decision the Legislature by §7, Ch. 16170, Acts of 1933, which was carried forward as §1001, Ch. 19355, Acts of 1939, and as §236.01 Fla. St. '41, has made specific provision that interest on the state permanent school fund be appropriated to and made a part of the State Teachers' Salary Fund, the purpose of which is to provide a minimum term of eight months each year in all schools. Under §236.12 Fla. St. '41, the expenditure of said fund is specifically limited to certain designated items which do not include the use or expenditure proposed by you.

It is, therefore, my opinion that you cannot pay the cost of said abstract from the interest account of the permanent school fund.

FINANCE AND TAXATION

August 12, 1942.—042-406.

TEACHERS' SALARY FUND—INSTRUCTIONAL SALARY WARRANTS

QUESTION: Were instructional salary warrants Nos. 1-28 inc., 30-75 inc., and 211-221 inc., dated October 14, 1941, amount \$10 each, drawn against the State Teachers Salary Fund of Okaloosa County, Florida, payments in accordance with Section 1012 of the School Code (Section 236.12, Florida Statutes, 1941), and if not, what steps should be taken to restore such funds to the Teachers' Salary Fund from that county?

To Hon. Colin English, State Superintendent of Public Instruction:

Information from the State Treasurer's Office advises that from the face of said warrants, the same purported to be for instructional salaries; however, a letter from the State Teacher's Office to your Department states:

"We have reasons to believe these warrants were drawn to pay for physical examinations of the teachers, and were deducted from their annual salary as discussed with you recently."

This statement appears supported by the fact that while each warrant was endorsed by the payee therein named (whom I presume the certified list will show to be a regularly employed teacher) each warrant also contains a second endorsement by Enzor Brothers Hospital or Dr. Enzor.

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Other than Sec. 231.17 Fla. St. 1941 (Sec. 517 School Code), which provides for such physical examination as may be prescribed jointly by regulations of the State Board of Education and the State Board of Health as a requirement for obtaining a teacher's certificate, I find no statute which requires physical examinations by instructional personnel.

Sec. 236.12 Fla. St. 1941 (Sec. 1012, School Code) relating to the State Teachers Salary Fund, provides that funds can be withdrawn from the instructional salary portion of the Teachers Salary Fund for only four purposes, i.e., paying (1) teachers' salaries; (2) principal and interest of any approved loan; (3) contributions to State Teachers retirement system; and (4) premiums on group insurance for instructional personnel.

If the above referred to warrants were drawn in payment for physical examinations or any purpose other than the four specified in the above statute, the same were unlawfully drawn on said fund and funds so withdrawn should be replaced. The mere fact that the warrants were drawn to a teacher with an endorsement by said payee and deduction from monthly or annual salary due said teacher, does not validate the purpose for which they were drawn, if the same was not one of the designated statutory purposes.

Sec. 230.23 (7) (g), Fla. St. 1941 (Sec. 423 (7) (g), School Code provides in part that—

"All contracts with members of the instructional staff shall be in accordance with the salary schedule adopted by the County Board."

An examination of the form of contract for instructional staff of public schools approved and authorized by the State Board of Education, fails to disclose any right by the county board of public instruction to require any payments or contributions by any teacher, that would result in a deduction from or reduction of the amount of a salary contract.

If the warrants hereinabove referred to result in such deduction or reduction of teacher salary contracts, it is my opinion that the teachers named as payees in said warrants should be reimbursed from the instructional salary portion of the teachers salary fund, in the amount of the warrant payable to and endorsed by each for payment of their physical examination or other unauthorized purpose.

Under Sec. 230.22 (1), Fla. St. 1941 (Sec. 422 (1), School Code), granting general powers, it is the duty of the county board to

"(1) Determine Policies.—The county board shall determine and adopt such policies as are deemed necessary by it for the efficient operation and general improvement of the school board system."

and under Sec. 230.23 (7) (a), Fla. St. 1941 (Sec. 423 (7) (a), School Code), it shall be the duty of the county board:

"(7) Personnel.—To designate positions to be filled, prescribe qualifications for those positions . . ."

"(a) Positions and Qualifications.—To act upon recommendations submitted by the County superintendent for positions to be filled and for minimum qualifications for personnel for the various positions."

Under Sec. 230.24 (18), Fla. St. 1941 (Sec. 423 (18), School Code), the county board shall assume such other responsibilities and exercise such powers and perform such duties as in the opinion of the county board are necessary to provide for the more efficient operation of the county school system in carrying out the purposes and objectives of the School Code.

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Under such provisions it is my opinion that it was within the general authority and power of the county board to determine the necessity of and require physical examinations by instructional and administrative personnel; that the cost of the same should be paid by the county, there being no other provision therefor, and such expense should have been included as an item in the annual budget.

If the necessity for this qualification was determined after the annual budget became final, said expense should be paid from the Reserve for Contingencies; (Sec. 237.19, Fla. St., 1941 Sec. 1077, School Code). If funds of such Reserve are not sufficient to replace and reimburse the instructional salary portion of the Teachers' Salary Fund, other unexpended general county school funds of 1941-1942, on written permission by you as State Superintendent (Sec. 237.03, Fla. St., 1941 Sec. 1061, School Code) may be used to reimburse the Teachers' Salary Fund. If such unexpended general county school funds are not sufficient for such repayment, such unpaid balance should be carried over and included in the budget for payment next fiscal year; (Sec. 237.19, Fla. St., 1941 Sec. 1077, School Code).

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May 14, 1941.—041-256.

TEACHERS' SALARY FUND—GROUP INSURANCE

QUESTION: May the Teachers' Salary Fund be used to pay insurance premiums on group insurance?

To Hon. J. Edwin Larson, State Treasurer:

No portion of the salaries payable from the Teachers Salary Fund may be used to pay the insurance premiums on group insurance, for the reason that Section 1012 of Article 10, Chapter 19355, Acts of 1939, provides:

"No warrants shall be drawn against the instructional salary portion of the Teachers' Salary Fund allotted to any county save and except for the purpose of paying the salaries of properly certificated instructional personnel under contract in the public schools of such county during the current school year or for the previous year as prescribed by law: . . ."

It is my opinion, for the same reason, that no portion of this fund may be used to pay the teachers' dues to the Florida Education Association.

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February 3, 1941.—041-26.

**TEACHERS' SALARY FUND—LOANS AGAINST EXPECTED REVENUE
—NO DEFERRED PAYMENT PLAN**

QUESTION: Does Section 1084 of the Florida School Code of 1939 provide a method for deferring payments of money borrowed thereunder?

To Hon. J. Edwin Larson, State Treasurer:

Sub-section 1 of Section 1084 of the Florida School Code of 1939 provides:

"Current Loans Against State Teachers' Salary Fund.—The County Boards of the several counties of the State of Florida are hereby authorized and empowered to borrow, at a rate of interest not exceeding six

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per cent per annum, sums not exceeding ninety per cent of the amount of revenue reasonably expected to be received from the apportionment to the county from the State Teachers' Salary Fund after said estimate has been approved by the State Superintendent. *Any moneys borrowed under the provisions of this Section for any fiscal year shall be repaid to the parties from whom borrowed or to whom the same may be due out of the first funds apportioned, allocated, or distributable from said source to or for the county for which said money was borrowed.* The right and power to borrow money herein granted shall be cumulative to other such powers granted by law, but the anticipated receipts from the apportionment to the county from the State Teachers' Salary Fund shall not be considered in borrowing money under any other law. No money shall be borrowed under the provisions of this Section unless all money borrowed under the provisions of this Section for previous fiscal years has been repaid in full."

You will note the above portion of the statute that I have emphasized contemplates that any money borrowed will be repaid out of the first funds apportioned, allocated or distributable. In this connection subsection (c) of the same Section provides:

"Apportionment of Funds Borrowed: Warrants.—When any County Board shall have obtained any loan under the provisions of this Section the first funds apportioned, allocated, or distributable to or for the county for which such loan was obtained from the State Teachers' Salary Fund, shall be applied to the repayment of the money borrowed until the same shall have been fully repaid with any interest that may be due upon the money so borrowed, and for that purpose the County Board of the county may draw all such warrants upon the State Treasurer as ex-officio treasurer aforesaid, as may be required to repay the money borrowed, with any interest that may be due therefor, but any warrant drawn for the repayment of any loan or interest thereon shall so provide upon the face of said warrant."

Since the above quoted Sections of our School Code are silent as to any way for deferring payments of money borrowed under said Sections, I do not believe it would be proper for me to approve a form with that end in view.

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August 25, 1941.—041-482.

TEACHERS' SALARY FUND—TRANSFERS

QUESTION: (1) Can money transferred from Transportation to Instructional Salary portion of Teachers' Salary Fund be transferred back to the Transportation portion at a later date?

(2) Can money transferred from Transportation portion to Instructional Salary portion in one fiscal year be transferred back after the end of that fiscal year which is June 30?

To Hon. J. Edwin Larson, State Treasurer:

(1) In my opinion this money can be transferred back to the Transportation portion from the Instructional Salary portion of the Teachers' Salary Fund. I find no prohibition in our law preventing such a transfer. I do not believe that Section 9 of Chapter 20970, Laws of Florida, Acts of 1941, prevents such a transfer, but that this section only prevents the drawing of a warrant on the Instructional Salary portion of the Teachers' Salary Fund to pay for the expenses incurred by reason of transportation. In other words, it is nothing more than a loan or a bookkeeping entry, crediting one account and debiting the other.

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(2) In my opinion this money cannot be transferred back after the end of the fiscal year, for the reason that Chapter 20970, Laws of Florida, 1941, provides that the loans must be repaid not later than April 1 or April 15 of the fiscal year, depending upon the nature of the loan, and for the further reason that for you to put any other construction on the law might result in the local Board's going back for any number of years and transferring moneys from the Teachers' Salary portion over to the Transportation portion, resulting in little or no money to pay the salaries of teachers.

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September 18, 1942.—042-453.

TEACHERS' SALARY FUND—TRANSFER FROM UNEXPENDED BALANCE

QUESTION: Would the transfer of \$7,728.00 by the Madison county school board of an unexpended balance of \$24,378.96 in the Teachers' Salary Fund on hand June 30, 1939, to the transportation portion thereof be legal?

To Hon. Colin English, State Superintendent of Public Instruction:

Section 1012, Ch. 19355, Acts of 1939, which regulated expenditures from the State Teachers' Salary Fund, including the transportation portion thereof, provided in part: "Any balance in the Teachers' Salary Fund to the credit of any county on June 30, 1939, shall be expended under the provisions of the law in effect at the time the School Code (Ch. 19355) becomes a law."

The statute governing the same prior to June 30, 1939, was Sec. 7, Ch. 16170, Acts of 1933, which provides in part as follows: "No warrant shall be drawn against the Teachers' Salary Fund of any county, save and except for the purpose of paying the salaries of teachers in the public free schools of each county in the current scholastic year and for expenses incurred in the transportation of pupils in said period, and each warrant drawn must state upon such warrant that the same is drawn for one of these purposes and none other."

While said statute does not limit or make any specific allocation of said fund for teachers salaries and transportation, the State Board of Education adopted a regulation on July 6, 1933, which limited expenditures of the teachers' salary fund to 12½% for transportation purposes, except on permission and consent granted by said Board.

However, Sec. 9 of Ch. 20970, Acts of 1941, amended Sec. 1012, Ch. 19355, Acts of 1939, relating to expenditure of State Teachers' Salary Fund. While in the amendment the provision was retained that "the treasurer should keep a separate account of the part of the fund which is credited to instructional salaries and that part of the fund which is credited to transportation," par. 1 of said section provides that "No warrants shall be drawn against the instructional salary portion of the teachers' salary fund allotted to any county, save and except for the purpose of (1) paying the salaries of properly certificated instructional personnel under contract in the public schools of such county during the school year, (2) for paying the principal and interest of any approved loan as prescribed in Section 1084 (1), (3) for paying contributions to the state teachers retirement system as authorized by law, or (4) for paying premiums on group insurance for instructional personnel . . ." Par. 2 of said section provides: "Warrants for the expense incurred for the transportation of pupils or for instructional salaries

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may be drawn against the transportation portion of the teachers' salary fund allotted to any county."

Sec. 15 of said Ch. 20970 provides: "All laws or parts of laws, general, special or local, in conflict with the provisions of this act are hereby repealed."

The specific limitation by said Sec. 9 of purposes for which warrants can be drawn against instructional salary portion of the state teachers' salary fund appears to be in conflict with the provision of Sec. 1012 of Ch. 19355 which permitted a balance in the teachers salary fund to the credit of the county on June 30, 1939, to be expended under the provisions of the law in effect at the time the School Code becomes a law.

It is my opinion that the last mentioned provision of Sec. 1012, Ch. 19355, was repealed by Sec. 15 of Ch. 20970; and the privilege of transferring funds under Sec. 1012 of Ch. 19355, from any balance in the teachers' salary fund on June 30, 1939, to the transportation portion of said fund, was limited to and withdrawn on the effective date of Ch. 20970—June 14, 1941. Further, that the transfer of funds from the instructional salary portion of the teachers' salary fund to the transportation portion, approval of which was applied for to you and the State Board of Education, is not now authorized by law, and would not be a legal transfer.

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December 10, 1942.—042-554.

**TEACHERS' SALARY FUND—WARRANTS—PAYEES AND
ENDORSEMENTS**

QUESTION: May the State Treasurer accept (1) Warrants to be paid from the Teachers' Salary Fund where a co-payee is indicated on the face of the warrant; and (2) What types of endorsements may he accept without liability?

To Honorable J. Edwin Larson, State Treasurer:

As to the first question, §236.12 Fla. St. '41 provides in part that "No warrants for instructional salaries shall be honored from any county unless the county superintendent from that county shall have submitted to the state superintendent with a copy to the state treasurer a list of instructional personnel who are employed for the year and for whom salaries are to be paid from the state teachers' salary fund."

It is my opinion that upon receiving a copy of said list of instructional personnel you are authorized to accept or honor only those warrants which contain as named payees the names of instructional personnel appearing on said list; and if co-payees are named, one or more of whose name does not appear on said list you should refuse to honor said warrant.

As to the second question, it is my further opinion that you may accept without liability only those warrants which contain:

(1) An endorsement in the name of the payee by the payee personally. A subsequent bank endorsement by stamp or otherwise in effect guarantees the signatures of previous endorsers.

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(2) An endorsement on the warrant such as "Deposit to the account of (*name of payee*)" and a subsequent bank endorsement or stamp, which indicates that the account of the payee was credited with the amount of the warrant.

(3) An endorsement of a third party pursuant to authority given by the payee, as evidenced by a duly executed power of attorney in writing which sufficiently describes the warrant to identify it, which power of attorney should be attached thereto.

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May 2, 1941.—041-234.

TEACHERS' SALARY FUND—WARRANTS—SIGNATURE BY RUBBER STAMP—PRINTING MACHINE

QUESTION: Under Chapter 19355, Laws of 1939, is it permissible for the State Treasurer as Ex-Officio Treasurer of Teachers' Salary Fund to accept any warrants drawn against this fund signed by the County Superintendent of Public Instruction and Chairman of the County Board of Public Instruction with the signatures of these officials in the form of a rubber stamp, printing machine, check writing machine, or pen and ink by secretary?

To Hon. J. Edwin Larson, State Treasurer:

I find no provision in Chapter 19355 as to the manner in which the warrants are to be drawn, nor is there any prohibition under our negotiable instrument law as to the manner in which checks, warrants, and the like shall be signed. There are decisions that a rubber stamp signature is permissible and the decisions seem to hold to the effect that so long as the drawer authorized the drawing of the instrument, the manner in which he so authorizes is immaterial.

I appreciate your concern in honoring warrants bearing a rubber stamp signature, as you have no way of knowing whether or not the proper official authorized the drawing of that particular warrant. I, therefore, suggest that you have the officials acknowledge in writing to you the rubber stamp, the printing machine, the check writing machine, or the signature of the particular secretary which you are authorized to honor. In order to make myself more clear, I give this example: Have those officials using a rubber stamp signature acknowledge in writing to you that this particular rubber stamp, as is evidenced by the stamp on the letter, is their authentic signature and that you may honor all warrants bearing the same. Have the same done by those officials who use a printing machine or a check writing machine, or one of their employees writing his signature.

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October 24, 1941.—041-614.

TEACHERS' SALARY FUND—WORKMEN'S COMPENSATION INSURANCE

QUESTION: Can Workmen's Compensation Insurance premium be paid from the Instructional Salary or Transportation Account of the Teachers' Salary Fund?

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To Hon. Colin English, State Superintendent of Public Instruction:

To Hon. J. Edwin Larson, State Treasurer:

Section 1012 of the Florida School Code, as amended, permits the instructional salary portion of the Teachers' Salary Fund to be used only for (1) paying the salaries of certificated teachers, (2) paying the principal and interest on approved loans under Section 1084 (1), (3) paying contributions to the State Teachers' Retirement System, and (4) paying premiums on group insurance for instructional personnel under certain conditions. My opinion is, therefore, that warrants cannot be drawn against the instructional salary portion of the Teachers' Salary Fund for the payment of any premium for workmen's compensation insurance.

Sub-section 2, of Section 1012 of the Florida School Code, as amended, provides:

"Warrants for the expenses incurred for the transportation of pupils or instructional salaries may be drawn against the transportation portion of the Teachers' Salary Fund allotted to any county."

The phrase "expenses incurred for the transportation of pupils" is broad in character and the Legislature evidently contemplated that it would cover any expenses of any kind incidental to the transportation of pupils. Premiums on workmen's compensation insurance covering persons employed by the county board of public instruction for the operation or maintenance of school buses or to assist in the transportation of pupils in any other manner are properly considered "expenses incurred for the transportation of pupils." My opinion is that warrants may be drawn against the transportation portion of the Teachers' Salary Fund for the payment of premiums for workmen's compensation insurance covering such persons only.

FINANCIAL ACCOUNTS AND EXPENDITURES

April 2, 1941.—041-180.

BOARD OF EDUCATION—REFUNDING FEE—PAYMENT

QUESTION: Is the State Board of Education required to pay a requested fee of \$40.00 per bond on the refunding bonds of the City of Haines City when such bonds are held in the state school fund?

To Honorable Colin English, State Superintendent of Public Instruction:

We have examined the Court file of the bankruptcy proceedings in the Federal District Court in Tampa, and find that Section 9 of the plan of composition reads as follows:

"Provision is made that R. E. Crummer & Company, Fiscal Agent, shall be compensated for its services and reimbursed for its costs in connection with the refunding of the outstanding indebtedness of said city by being paid the proceeds of an assessment against participating bondholders, the amount of such assessment to be a matter between R. E. Crummer & Company and the bondholders participating in the plan. The assessment has been set at \$40.00 per \$1000.00 bond tendered for exchange, or rateable portion thereof in the case of bonds of less than \$1000.00 denomination."

The plan of composition in which the above section is found was approved by the Federal District Court in an interlocutory decree.

It is consequently incumbent upon the State Board of Education as

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well as other participating bondholders to pay \$40.00 per \$1000 bond in accordance with the above quoted Section.

FINANCIAL ACCOUNTS AND EXPENDITURES

September 16, 1942.—042-446.

BOND CONSTRUCTION FUND—DISTRICT—LOAN TO COUNTY SCHOOL BOARD

QUESTION: Could Dade County issue tax anticipation notes and sell them to the Bond Construction Fund at a very low interest rate, redeeming these notes when local tax monies are available? Or, would it be possible to make a direct loan from the Bond Construction funds to the General Operating funds with the approval of the State Board of Education and the State Superintendent of Public Instruction?

To Honorable Colin English, State Superintendent of Public Instruction:

Your request makes only a general reference to the "Bond Construction fund." However, I am informed that such reference is to certain district bond construction funds which, after being made available for construction purposes, could not be used because of shortages occasioned by the war in vital materials necessary in such construction.

Section 237.26, Florida Statutes, 1941, authorizes the county school board to negotiate a current loan to be repaid from the proceeds of revenues reasonably to be anticipated during the fiscal year in which the loan is made.

Section 236.35, Id. provides that the District Bond Construction Fund shall be used primarily for capital outlay purposes, and seeks to protect and conserve said funds for the purposes for which they are required.

Section 237.03, Id. provides that no transfer shall be made from the Bond Construction Fund, except transfers of balances authorized by law.

While the proposed loan or investment does not come strictly within the designated statutory use for district bond construction funds, we must bear in mind that this construction fund bears the same relative position as the statutory sinking fund for the retirement of bonds; and that is the proposed construction is never accomplished these construction funds should be used to retire the bonded debt which produced them; and that these bond construction funds should not remain idle during the emergency, but rather, should be invested as general sinking funds to produce as great a return as possible to offset the accumulating interest on the outstanding bonds.

Sections 236.54 and 236.55, Id. authorize the investment of sinking funds by county boards in bonds maturing before the date of the sinking fund bonds; and the latter section specifically provides: "... and the county board shall have the further right to invest the sinking fund of any district in any general county bonds of the same county."

It is my opinion that the proposed investment or loan of said bond construction funds is neither an expenditure nor a transfer of bond construction funds as prohibited by the statute, and that such use thereof will be for a legal purpose.

This opinion is supported by the action of the State Board of Education in adopting, on March 17, 1942, a regulation re temporary invest-

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ment of bond construction funds during war emergency—, which also authorizes an investment of such funds, on the same being specifically approved by the State Superintendent of Public Instruction, "(4) In any bonds or obligations of the county board for the payment of which the taxing power of the county board has been pledged, providing such bonds or obligations are not in default and mature within five years from the date of purchase or are callable bonds or obligations which the county board has financial ability to retire within five years from the date of purchase."

It is my further opinion that the proposed investment should be evidenced by tax anticipation notes or warrants issued by the county board which pledge the taxing power of the county board for the payment thereof, and pledge the application of current tax collections to the payment and redemption of the same.

FINANCIAL ACCOUNTS AND EXPENDITURES

August 25, 1941.—041-476.

**COUNTY BOARD OF PUBLIC INSTRUCTION—REFUNDING PLAN—
APPROVAL**

QUESTION: Certain refunding bonds issued by a county board of public instruction were validated by court decree prior to the effective date of Chapter 20970, Acts of 1941, but were not sold and delivered to the purchasers until subsequent to the effective date, and the proposed plan for refunding was not submitted to the State Superintendent as required by Section 13 of said chapter (which added Section 1086.1 to the School Code). Was it necessary for the refunding plan to be approved under Section 1086.1?

To Hon. Colin English, State Superintendent of Public Instruction:

In my opinion your approval of the plan for refunding under the circumstances you describe was not required in view of the fact that the refunding bonds were judicially validated prior to the effective date of Section 1086.1.

FINANCIAL ACCOUNTS AND EXPENDITURES

March 26, 1941.—041-167.

**COUNTY BOARD OF PUBLIC INSTRUCTION—DISBURSEMENT OF
FUNDS**

QUESTION: May funds accruing to the credit of a county from the State Racing Tax be paid to the Treasurer of the State of Florida as ex-officio treasurer of the Teachers' Salary School Fund of said county and disbursed upon warrants drawn by the Board of Public Instruction of such county for the purpose of paying salaries and transportation expenses only, and may a loan be made against such funds and the payment thereof made out of said fund, the proceeds of the loan to be disbursed in the same manner as provided for the original revenue? Does this violate Section 9, Article XII or any other constitutional provision?

To Hon. Colin English, State Superintendent of Public Instruction:

Section 9, Article XII, provides:

"In addition to the tax provided for in Section 8 of this Article the County School Fund shall consist of the proportion of the interest

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of the State School Fund and of the one mill State tax apportioned to the county, all capitation taxes collected within the county and all appropriations by the Legislature which shall with all other County School Funds be apportioned and distributed as may be provided by law and shall be disbursed by the County Board of Public Instruction solely for the support and maintenance of public free schools: Provided, that such apportionment and distribution shall be made by general law based upon some declared principle of classification to be determined by the Legislature."

The funds accruing under Chapter 14832, Acts of 1931, however, according to Section 13 thereof, are not required to be used for school purposes, but it is provided that the county commissioners shall have the power to determine whether such moneys shall be converted into the County School Fund or some other lawfully authorized fund. For this reason I do not believe that the prohibition in Section 9, Article XII of the Constitution, against special or local acts relating to the apportionment and distribution of appropriations, is applicable.

I do not find any other constitutional provision that this special act appears to violate.

FINANCIAL ACCOUNTS AND EXPENDITURES

March 27, 1941.—041-176.

**COUNTY BOARD OF PUBLIC INSTRUCTION—INSURANCE—
MUTUAL FIRE INSURANCE COMPANIES**

QUESTION: May County Boards of Public Instruction take out fire insurance in mutual companies, properly registered with the State, in which a maximum premium is fixed and refunds are made at the end of the year by the company, if this maximum amount is not needed to cover losses?

To Hon. Colin English, State Superintendent of Public Instruction:

As you know, this subject has been covered by several opinions from this office during the past few years, although these opinions are not specifically directed to the particular situation you describe. Among those previous opinions are those reported in the 1933-1934 Biennial Report, pages 426 and 428, and that in the 1937-1938 Biennial Report, page 161.

The constitutional provision involved in determining this point is Article IX, Section 10, which reads as follows:

"The credit of the State shall not be pledged or loaned to any individual, company, corporation or association; nor shall the State become a joint owner or stockholder in any company, association or corporation. The Legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual."

In summary, it was held in these opinions that the insurance of public school buildings is prohibited in mutual companies, whether domestic or foreign, where the policy provides for the assessments of the members of such company, and for division of profits with such members; that such insurance is also unauthorized where there is any contingent liability assumed or agreed to be paid by the school authorities, or where such school authorities in effect become members of the association or corporation by sharing in the profits.

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In an opinion dated October 10, 1934, it was held that when a mutual insurance association or company writes a cash premium policy with no provisions either for assessment of policyholders or for distribution of profits, school boards, or other local authorities, may properly insure public buildings in such company.

I reaffirm those opinions, but the question remains as to the meaning of distribution of profits, with reference to the situation you describe. In other words, when a maximum premium is fixed and refunds are made at the end of the year by the company, if this maximum amount is not needed to cover losses, does this constitute the distribution of profits.

This being so, I answer your question in the affirmative when only such refunds are received by the county boards.

Stating it more precisely, therefore, a county board of public instruction has the authority to insure buildings under its supervision with a mutual fire insurance company, provided that the insurance policy contains a provision that there shall be no assessment of policy-holders, and a provision that there shall be no distribution of profits to policy-holders. This does not prevent, as stated above, a further provision that refunds may be made at the end of the year by the company, if the amount of maximum premium is not needed to cover losses—so long as such distribution at the end of the year is a true refund and not a profit. I am assuming, of course, that the mutual fire insurance company has complied with the laws of Florida, relating to the issuance of policies without contingent liability of policy-holders.

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October 22, 1941.—041-607.

COUNTY BOARD OF PUBLIC INSTRUCTION—PURCHASE OF PROPERTY

QUESTION: (1) Under Section 1085, Chapter 19355, Acts of 1939, may County Board of Public Instruction purchase property for school purposes when the total purchase price is equal to one-fourth of the revenue of the county during the preceding year and when, in addition, the board undertakes to assume a mortgage against the property which, when added to the purchase price, will make the total obligation exceed one-fourth of the revenue for the preceding year?

(2) If an application by a county board of public instruction for a loan is divided for the sake of convenience so that the district funds will be liable for part of the obligation and county funds liable for part, can it be considered as one application under sub-section 4 of Section 1085?

To Hon. Colin English, State Superintendent of Public Instruction:

(1) Section 1085 of the Florida School Code as amended provides that no obligations of the nature prescribed in the section may be incurred by a county board of public instruction when such obligations exceed one-fourth of the revenue of the preceding year, except in the case of the purchase of transportation equipment as prescribed. In speaking of "assuming a mortgage or lien" against property, what is really meant is the assumption of the obligation which is secured by a mortgage or lien against the property. Accordingly, in case of an assumption of an obligation secured by a mortgage or lien on property being purchased under Section 1085 of the Florida School Code, such obligation must be added to any other obligation incurred in connection with the

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purchase of that land. It is, therefore, my opinion that if the total of such obligations is more than one-fourth of the revenue of the preceding year, the purchase in the situation you describe would be illegal.

(2) The provision of Section 1085 (4) of the Florida School Code "... that the State Board shall not approve more than two such applications for any county during one year" is a directory provision to insure orderly administration of Section 1085. If, therefore, the State Board of Education, as a matter of administrative procedure, should consider the above procedure as a single application, this is quite proper under the provision.

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August 15, 1941.—041-454.

COUNTY BOARD OF PUBLIC INSTRUCTION—REDUCTION OF MILLAGES

QUESTION: May the required resolution of the County Board relating to the millage necessary to be levied against each fund be adopted by the County Board at any time after the Board approves the budget or can this resolution be adopted only after the budget becomes official as prescribed in Section 1075?

After the resolution relating to tax levies has been filed with the Board of County Commissioners, does the Board of County Commissioners have any discretion other than to order the Assessor to assess the millage levies certified by the County Board? Can these millage levies be changed in any way by the County Commissioners or can the Assessor assess any other levy or the Collector collect taxes other than according to the levies certified by the County Board?

To Hon. Colin English, State Superintendent of Public Instruction:

(Under Sub-section (6) of Section 119 of Chapter 19355, Laws of Florida, Acts of 1939, County Board is defined as "County Board of Public Instruction.")

I am of the opinion that the resolution mentioned above can only properly be adopted after the budget becomes official.

It is my opinion that the budget controls the millage and that if the County Board of Public Instruction requested the Board of County Commissioners to levy a millage that would produce an amount in excess of their budget, I see no reason why the Board of County Commissioners could not reduce the same accordingly. There might be other instances in which it would be proper to do so which would depend entirely upon the facts and circumstances. For instance, if the County Commissioners allocated to the County Board of Public Instruction for school purposes, say a certain portion of the race track taxes distributed to this county and if the amount of same was equivalent to five mills or some other millage, then I see no reason why the Board of County Commissioners could not reduce the millage accordingly.

FINANCIAL ACCOUNTS AND EXPENDITURES

May 20, 1941.—041-278.

COUNTY BOARD OF PUBLIC INSTRUCTION—WARRANTS—PURCHASE BY BOARD OF EDUCATION

QUESTION: What are the conditions under which the State Board of Education may purchase \$7,000 of interest bearing coupon warrants

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of the Union County Board of Public Instruction backed by suitable resolution of the Board of Public Instruction of Union County?

To Hon. Colin English, State Superintendent of Public Instruction:

In my opinion the resolution sufficiently complies with the requirements of Section 1086 of the Florida School Code, relating to the retirement of existing indebtedness which is unfunded or in default. In rendering this opinion, I assume that a detailed plan has been submitted to the State Superintendent and approved by him, showing the funds needed for operating the schools in Union County on the most economical basis practicable, the amount of any other obligations which must be met each year, the total funds available each year for the entire school program, and the funds that can be reasonably spared for the retirement of indebtedness without needlessly handicapping the school program and which can be budgeted each year for the retirement of such indebtedness, and that the proposal stated in the resolution is in accordance with such plan, to the end that the interest bearing coupon warrants can be paid without needlessly handicapping the school program and the funds therefor can be budgeted each year.

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September 15, 1941.—041-530.

COUNTY SCHOOL BUDGET—APPROVAL

QUESTION: Must the budget of a County Board of Public Instruction be submitted to the State Superintendent of Public Instruction for approval?

To Hon. Colin English, State Superintendent of Public Instruction:

In my opinion, that portion of Section 54, Chapter 20722, Laws of Florida, 1941, which provides that in case the budget of a County Board of Public Instruction is increased or decreased it must be submitted to the State Superintendent of Public Instruction for his "approval under the existing provisions of law," should be interpreted to mean that the State Superintendent's authority to approve such a budget is controlled by the provisions of Sections 1070 to 1078 of the Florida School Code.

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December 23, 1942.—042-577.

COUNTY SCHOOL BUDGET—APPROVAL

QUESTION: Can the State School Superintendent withhold final approval of the Escambia County school budget until his requirements as to two transfers in said budget have been complied with?

To Hon. Colin English, State Superintendent of Public Instruction:

Chapter 237, Fla. St. '41, relates to county school budgets and Section 237.05 establishes a budget system for the control of finances of county boards. The annual budget must be prepared and submitted on forms and in accordance with regulations prescribed by the State Board (§237.06).

The statute requires the school budget to be submitted to the state superintendent (§237.12), who shall examine same and he shall (1) require changes (2) suggest changes, or (3) certify it as satisfactory

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(§237.14). If the budget has been improperly prepared, the state superintendent shall *require* that the budget be changed (§237.15), and if the budget contains improper or illegal appropriations, or other than harmless improprieties in form, it shall be revised and corrected (§237.15 (5)). While no irregularities in form of any budget shall invalidate it, the statute specifies that such provision is conditional—"provided that the budget and the taxes levied conform substantially to the principles and provisions of said sections" (§237.24).

In counties having budget commissions, the budget adopted by said commission shall conform in every respect to the requirements of law (§237.22).

The State Board of Education has the duty and responsibility to authorize, approve and require the use of forms (§229.08 (18)).

The forms for preparation of the school budget have been authorized and approved by duly promulgated rules and regulations of the State Board. Such rules and regulations have the force and effect of law (§229.06).

Referring specifically to your two requirements for amending the budget:

1. \$14,191.32 received as insurance funds paid on a fire policy on the Bratt Building, budgeted for miscellaneous current expenses required to be transferred to cash balance. Such funds are required in the budget "to be made available in the district bond construction fund" (§237.09 (2) (d)). If said insurance funds under any circumstances might be considered such as to be returned to the general fund, State Board rules and regulations and prescribed forms have made provisions for earmarking such funds for their legally intended purposes.

2. \$8,100.00 budgeted as "reserve for contingencies" required to be transferred to debt service to pay notes given for insurance for current year. This is not an indebtedness authorized or permitted by §237.25, and is not excepted or exempted from §237.01 by §12, Ch. 20970, Acts of 1941, as an obligation that need not be retired during the current fiscal year. Insurance for the current year, under rules and regulations of the State Board, is a current operating expense and as such must be charged to the fiscal year in which it is incurred (§237.01).

Neither the state superintendent nor the county board has any discretion as to how such items should be budgeted because the foregoing statutes and rules and regulations of the State Board (1) definitely classify said insurance money of \$14,191.32 and provide how it shall be budgeted, and (2) limit indebtedness for insurance as to time of payment and specify how the same shall be budgeted. The changes required by you to be made before finally approving the budget only sought compliance with the governing statutes. Such did not constitute suggested changes as contemplated by §237.14 (2), or recommended changes to improve the county school program, which the county board might in its judgment adopt or reject under §237.16.

To permit the county board to (1) budget and use insurance funds for miscellaneous current expenses without a proper and sufficient showing that capital expenditures for which they were intended to be used are no longer necessary, or (2) omit from the current budget debt service item notes for insurance for the current year, would be a direct violation of the mandatory requirements of the cited statutes and rules and regulations of the State Board, and would render of no effect said statutes

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which require the state superintendent to see that the law is complied with and that the budget is properly prepared as required by law before giving approval thereto.

It is my opinion that you can withhold final approval of said budget until your above-mentioned requirements are complied with.

FINANCIAL ACCOUNTS AND EXPENDITURES

January 30, 1941.—041-23.

COUNTY SCHOOL FUNDS—ATHLETIC ASSOCIATION DUES

QUESTION: May the County Board of Public Instruction pay athletic dues for high schools in the County out of County School Funds?

To Hon. Colin English, State Superintendent of Public Instruction:

I am unable to find any authority of law that would permit the payment of dues for high schools to an athletic association from county school funds. However, I see no objection to the payment of such dues from other funds that are derived from sources other than by taxation.

FINANCIAL ACCOUNTS AND EXPENDITURES

July 3, 1942.—042-334.

DISTRICT SINKING FUNDS—INVESTMENT OF INTEREST

QUESTION: The Board of Public Instruction for Pasco County wishes to invest the Interest and Sinking Fund of Special Tax School District No. 7 in the purchase of two Pasco County Board of Public Instruction refunding bonds dated July 1, 1937. Are these bonds valid as required by Section 1055 of the Florida School Code?

To Hon. Walter C. Craig, Superintendent of Public Instruction for Pasco County, Florida:

I have examined the court files carefully, and in my opinion these bonds were properly and regularly issued under the legal provisions prevailing at the time of issue.

FINANCIAL ACCOUNTS AND EXPENDITURES

October 27, 1941.—041-638.

SCHOOL DISTRICT BONDS—VALIDITY

QUESTIONS: (1) Would any original issue of school district bonds issued under the provisions of Section 17, Article XII of the Constitution of Florida, whose maturities are not arranged in accordance with these requirements, be invalid?

(2) If any district school bonds issued under the provisions of Section 17, Article XII of the Constitution of Florida were refunded before Chapter 20970, Acts of 1941, became effective, would the schedule of maturities under a refunding plan have to meet requirements of Section 17, Article XII of the Constitution?

(3) Would any bonds refunded after the effective date of Chapter 20970, Section 13, Acts of 1941, which is Section 1086.1 of the Florida School Code, be valid unless the procedure prescribed in this section,

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including approval of the state superintendent of the plan, is observed?

To Hon. Colin English, State Superintendent of Public Instruction:

(1) Section 17, Article XII, of the Constitution of Florida provides:

"Any bonds issued hereunder shall become payable within thirty years from the date of issuance in annual installments which shall commence not more than three years after the date of issue. Each annual installment shall be not less than three per cent of the total amount of the issue."

This question should be answered in the affirmative. "When the constitution provides the manner of doing an act, the manner prescribed is exclusive." (*Weinberger vs. Board of Public Instruction*, 93 Fla. 740, 112 So. 253, 1927.)

(2) Article IX, Section 6, of the Florida Constitution, as amended November 4, 1930, has been held to supersede Article XII, Section 17, regarding the maturities of school district refunding bonds (*State vs. School District No. 5*, 140 Fla. 65, 191 So. 843, 1939). In pursuance of Article IX, Section 6, of the Constitution as amended, the Legislature passed Chapter 15772, Florida Laws 1931, Extra Session, which became effective on July 29, 1931. This Act permitted school districts to issue sinking fund refunding bonds and did not restrict such districts to the issuance of serial bonds. The issuance of sinking fund refunding bonds under this Act has been sustained by the Supreme Court (*State vs. School District No. 5, supra*). Therefore, the answer to your second question is, in my opinion, in the negative, assuming that such refunding bonds were issued on or after July 29, 1931.

(3) This section specifies the procedure to be followed in connection with "any plan proposed for refunding any type of outstanding and legally incurred school indebtedness not covered by section 1086" (section 1086 relates only to the unfunded debt at the date of the adoption of the school code). This section also provides that "no indebtedness of any type may be refunded on a sinking fund basis." These provisions are clearly in conflict with the provisions relating to the refunding of school district bonds in Chapter 15772, Laws of Florida 1931 Extra Session, and accordingly the latter provisions are therefore repealed by Section 15, Chapter 20970, Laws of Florida 1941. Therefore, your third question should be answered in the negative.

FINANCIAL ACCOUNTS AND EXPENDITURES

December 9, 1941.—041-648.

SCHOOL INDEBTEDNESS—REFUNDING

QUESTION: Must plans for refunding school indebtedness not covered by Section 1086 of the Florida School Code be approved under rules and regulations of the State Board of Education before they become legal?

To Hon. Colin English, State Superintendent of Public Instruction:

"Any proposed plan for refunding any type of outstanding and legally incurred school indebtedness not covered by Section 1086 shall be submitted to the State Superintendent for approval under regulations of the State Board."

In my opinion, this makes mandatory the adoption of rules and regulations of the State Board of Education and the approval of the

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state superintendent of public instruction only in conformity to such regulations. Until such rules and regulations are adopted, the legality of any refunding plan presented under Section 1086.1 of the School Code is doubtful, unless the State Board of Education permits the approval of such a plan in the absence of any rules and regulations.

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November 20, 1941.—041-657.

SCHOOL INDEBTEDNESS—VALIDITY

QUESTION: (1) What legal steps should a county board of public instruction take to determine whether outstanding indebtedness is valid so that invalid accounts may be removed from the records and valid accounts be paid?

(2) How does the statute of limitations operate as applied to the various types of school indebtedness?

(3) In view of the fact that the school laws prescribe that no obligations are to be incurred except as authorized by the county school board, may it be assumed that any purchases made by the trustees of any district, by individual trustees, by principals, by individual board members, or by others without authorization of the county board as prescribed by law, do not constitute valid school obligations and cannot be paid from school funds?

(4) Since expenses of operating a school within a district can be paid out of county or district funds, if such expenses are nevertheless charged against the district, may the county school board, if it desires to do so, prescribe by resolution that these obligations are to be assumed by the county general school fund and are to be funded and retired from the proceeds of the county general school fund?

To Hon. Colin English, State Superintendent of Public Instruction:

(1) In determining what is valid indebtedness so that invalid accounts may be removed and valid accounts paid, the county school board must consider each account on the basis of its own peculiar facts. This should be with the advice of the board's attorney, and the governing principle in determining the legality of an account is that all school indebtedness must be incurred in the maintenance of the schools and in accordance with the statutes pertaining thereto. If you wish a detailed analysis of such statutes, I shall furnish you with it.

(2) A statute of limitations may be applied to the obligations of the county school board in the same manner that it may be applied to the obligations of an individual. Various statutes of limitations are grouped in Sections 4646 to 4665 (1), inclusive, C. G. L. 1927, and may also be found in isolated cases under other groupings. The character of the obligation determines the statutory limitation applicable.

(3) Assuming the non-existence of a legal ratification or adoption by the county school board of the acts of any person making such purchases, my opinion is that your question should be answered in the affirmative.

(4) Inasmuch as the expenses should not be charged against any district fund, exceeding the amount included in the district budget and since the matter of charging indebtedness as between district funds and county funds is a matter of bookkeeping procedure, I am of the

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opinion that this question should be answered in the affirmative and that the county board may properly assume such obligations and fund them to be retired from the proceeds of the general county school fund.

Prior to the adoption of the Budget Law of 1937 (Chapter 18134, Laws of Florida, 1937) the matter of exceeding budget allowances did not arise; however, since the adoption of the Budget Law of 1937, which has been incorporated into the School Code, the exceeding of budget allowances has become a very important factor in determining the legality of obligations incurred by the county school board.

Section 1060 of the School Code which is a recodification of part of Section 21 of the Budget Law of 1937 provides:

"Expenditures should be limited to the amount budgeted under the classifications of accounts provided for each fund and to the total amount of the budget after the same have been amended as prescribed by law."

This places a definite limit upon the authority of the county school board to incur obligations; so a serious question arises as to the legality of any obligation incurred beyond any budget allowance.

Your fourth question seems to contemplate indebtedness which has been incurred prior to and in existence at the time of the adoption of the School Code as to which the law does not specify any regulatory requirements of the state board of education; however, in view of present restrictions incidental to the budget provisions, I suggest that consideration be given by the State Board of Education to the formulating of some plan whereby prospective creditors of a county school board may determine the credit limitations pertaining to the particular school board at the time any specific obligation is incurred.

In connection with the matter of exceeding budget allowances, I wish to point out that Section 1081 of the School Code as amended (Chapter 20970, Section 10, Laws of Florida, 1941) which continues and supplements part of Section 21 of the Budget Law of 1937, provides heavy penalties for any member of a county school board or any county superintendent who violates the provisions of the law relating to the school budget. Violation of these provisions subjects any such person to removal from office. Moreover, any member of the school board voting to incur an indebtedness against the county or district school funds in excess of the budget allowances, and any chairman of the board or any county superintendent signing a warrant to pay any such indebtedness, is personally liable for the amount of the indebtedness and is guilty of a misdemeanor. Upon the discovery of any such illegal expenditure, it is the duty of the state auditor to certify such fact to the state comptroller who, upon verification of the same, must advise the attorney general thereof. The attorney general must in turn institute proceedings against any person liable under this statute.

RETIREMENT SYSTEM FOR TEACHERS

February 4, 1942.—042-58.

BENEFITS—DEATH—PAYMENT PROCEDURE

QUESTION: What procedure should be followed in paying allowable benefits in case a teacher dies after retirement, or before retirement

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but after the death of the beneficiary designated by such teacher, in accordance with Section 7 (6) of the Act (Chapter 19014, Acts of 1939)?

To Hon. Bryan Willis, Actuary, Teachers' Retirement System:

In my opinion, the procedure provided for in Chapter 16992, Laws of Florida, 1935, should be followed. This Act provides for the distribution of a decedent's estate under certain circumstances without the necessity of formal administration and specifies that the total fees for proceeding under this Act shall not exceed \$3.50.

If the Probate Court enters an order of "no administration" pursuant to a petition properly filed under the Act, such order "shall constitute legal authority for the payment to the persons described in said order as the proper legal heirs entitled to receive said estate without administration by all creditors or debtors of said estate or persons purchasing property thereof, or otherwise dealing therewith." Accordingly, after such order is entered, the contributions payable under the Teachers' Retirement Act could be safely paid to the heirs named in such order.

RETIREMENT SYSTEM FOR TEACHERS

February 28, 1941.—041-93.

BOARD OF TRUSTEES—FUNDS—DEPOSIT

QUESTION: Under Section 10 (1) of Chapter 19014, Acts of 1939, has the Board of Trustees of the Teachers' Retirement System the authority to deposit the funds created by the Retirement Act in Federal Savings and Loan Associations, awaiting the investment of the funds of the securities required by law?

To Hon. Colin English, State Superintendent of Public Instruction:

Section 10 (1) of Chapter 19014, Acts of 1939, provides:

"The Board of Trustees shall be the trustees of the several funds created by this Act and shall have full power and it shall be the duty of the Board of Trustees, to invest and reinvest such portion of the funds as is not in its judgment required to meet current withdrawals. Such investments may be made only in interest bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States . . ."

A deposit in a federal savings and loan association is not an interest-bearing obligation of the United States, nor is it in my opinion an obligation guaranteed as to both principal and interest by the United States. It seems doubtful as to whether such a deposit is an "obligation" within the meaning of Section 10 of Chapter 19014, but even if it is, it would not qualify as a proper investment for the Board of Trustees, because it is my understanding that the Federal Deposit Insurance Corporation does not guarantee the interest on any insured deposit, but only guarantees the principal of an insured deposit up to \$5000. If this is so, such a deposit cannot be said to be "guaranteed as to both principal and interest by the United States."

This opinion has reference only to the investment of such portion of the funds created by the Retirement Act as is not in the judgment of the Board required to meet current withdrawals.

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May 8, 1941.—041-243.

**BOARD OF TRUSTEES—FUNDS—INVESTMENT IN F. H. A.
MORTGAGES**

QUESTION: Has the State Board of Education the right to purchase F. H. A. Mortgages for investment in the Teachers' Retirement Fund?

To Hon. Colin English, State Superintendent of Public Instruction:

Section 10 of Chapter 19014, Laws of Florida, Acts of 1939, relating to the management of the Teachers' Retirement Fund, provides in part:

"The Board of Trustees shall be the trustees of the several funds created by this Act and shall have full power and it shall be the duty of the Board of Trustees, to invest and reinvest such portion of the funds as is not in its judgment required to meet current withdrawals. Such investments may be made only in interest bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States."

Since F. H. A. mortgages are, of course, not interest-bearing obligations of the United States, the sole question is whether such mortgages are obligations guaranteed as to both principal and interest by the United States.

I have examined the National Housing Act as amended, and in my opinion F. H. A. mortgages cannot be considered such obligations. When a mortgage insured under the National Housing Act is conveyed to the Federal Housing Administrator after certain defaults, the Administrator issues debentures to the mortgagee, but the amount of the debentures includes only the unpaid amount of the original principal obligation of the mortgage, with certain adjustments, and does not include interest that may be due on the mortgage.

In addition, the debentures are issued only after the performance of certain conditions by the mortgagee. For these reasons it cannot correctly be said that the United States guarantees F. H. A. mortgages as to both principal and interest, and so the Board of Trustees has no right to purchase such mortgages for investment in the Teachers' Retirement Fund under Section 10 above quoted.

RETIREMENT SYSTEM FOR TEACHERS

October 30, 1941.—041-640.

**BOARD OF TRUSTEES—FUNDS—INVESTMENT IN U. S. SAVINGS
BONDS**

QUESTION: Can the Board of Trustees of the Teachers' Retirement System invest \$50,000 of the Annuity Savings Funds for each County in the State in U. S. Savings Bonds, or must the investment be limited to \$50,000 for each of the funds provided by the Retirement Act?

To Hon. Bryan Willis, Actuary, Teachers' Retirement System:

Section 562 of the Florida School Code provides:

"(1) The collection of members' contributions shall be as follows:

"(a) Each employer shall cause to be deducted from each and every payment of salary of a member for each and every payroll period

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subsequent to the first day of July, nineteen hundred and thirty-nine, the contribution payable by such member as provided in this Act.

"(b) Each employer shall transmit monthly to the Secretary of the Board of Trustees a warrant for the total amount of such deductions. The Secretary of the Board of Trustees, after making records of all such warrants, shall transmit them to the Comptroller who shall deliver them to the Treasurer of the State of Florida, who shall collect them."

In order to meet the requirements of this section, the establishment of a separate control account for each county is necessary and I understand that the accounts of the Teachers' Retirement System are set up on this theory.

According to the memorandum accompanying your letter, you prepare the individual county payrolls and send them to the respective county school boards at least five days before the payroll due dates. The county school board then returns a copy of the payroll with a warrant covering the amount contributed to the System for the teachers in that county. This warrant is credited to the county, and from the payroll the amount specified thereon is credited to each individual teacher. A deposit slip, listing all warrants of the several counties of the State, is made up and is transmitted with the warrants to the State Comptroller's office. The Comptroller verifies the correctness of the deposit and transmits the warrants to the State Treasurer for collection, who credits all such receipts to the annuity savings fund of the Teachers' Retirement System.

The requirements of Section 562 of the Florida School Code and the bookkeeping practice and handling of funds prevailing thereunder are analogous to the practices prevailing in banks and other depository institutions where, although all deposits may be placed in one fund by the depository, they stand to the credit of the various depositors.

In my opinion, none of these facts heretofore pointed out are sufficient to create separate legal funds of the county contributions to this retirement system fund. There are, however, several different funds making up this Teachers' Retirement system, namely: (1) the Annuity Savings Fund; (2) The Annuity Reserve Fund; (3) The Pension Accumulation Fund; (4) the Pension Reserve Fund; and (5) the Expense Fund; and these are separate funds with separate and distinct allocations.

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October 1, 1942.—042-472.

BOARD OF TRUSTEES—POWERS AND DUTIES

QUESTION: Has the Board of Trustees of the Teachers' Retirement System authority under Ch. 238, Fla. St. '41 to authorize and approve a teacher, retired on his own application, to accept a teaching position with the suspension of retirement allowance for the duration, and then at the end of the emergency again be retired under the provisions of the retirement act and receive retirement allowance?

To Hon. Bryan Willis, Actuary, Teachers' Retirement System:

Unless the member, on attaining sixty years of age, exercises the option and privilege of retiring and thereby claims the benefits extended by the law, the general purposes and objects of said chapter appear to

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contemplate the continuance of membership in the Teachers' Retirement System until arriving at seventy years of age.

I find no provision of said chapter which, by specific words gives a right to or prohibits a retired member from making an application to suspend retirement and retirement benefits, and be reinstated as an active member; or prohibiting the Board of Trustees from entertaining and acting upon such application.

Bearing in mind that retirement laws generally are construed liberally toward applicants (56 C. J. 431, §397) and that suspension of retirement might not operate to the prejudice of the retirement system, and reinstatement on an active basis would not confer any additional benefits or rights to the member, other than those acquired by virtue of additional services, it is my opinion that the Board of Trustees of the Retirement System has the authority, under Ch. 238, Fla. St. '41, to authorize and approve a retired teacher to again accept a teaching position, and, as a condition thereof, to order the suspension of his retirement allowance for the duration of active membership; and at the end of such to reinstate retirement and order the payment of the statutory retirement allowance based on the additional service added to previous accrued benefits.

Provided, however, and it is my further opinion that suspension of retirement and reinstatement is discretionary with said Trustees, and should be made only on application therefor being approved by the county superintendent and a showing of full compliance with all reasonable conditions imposed and such rules and regulations as may be adopted by the Trustees of the Retirement System touching on mental, physical and all other qualifications of the applicant required by the School Code and other statutes in addition to Ch. 238, Fla. St. '41. On any such application to suspend retirement being approved by said Trustees, a written notice of such approval should be given to the applicant teacher, County Superintendent and the Actuary of the Retirement System.

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August 19, 1941.—041-459.

"EARNABLE COMPENSATION"—DEFINITION

QUESTION: Does "earnable compensation" include that part of the salary paid any employee of the institutions of higher learning either (1) direct from the federal government, (2) from the funds of federal origin disbursed through the State of Florida, and (3) funds from county sources?

To Hon. Bryan Willis, Actuary, Teachers' Retirement System:

Paragraph (14) of Section 1 of Chapter 19014, Laws of Florida, Acts of 1939 as amended by Section 1 of Chapter 20749, Acts of 1941, reads in part as follows:

"'Earnable compensation' shall mean the full compensation to be received by a teacher for working the full working time for his position, whether the compensation is payable in whole or in part by the employer, or whether payable in part from other sources. In cases where compensation includes maintenance, the Board of Trustees shall fix the value of that part of the compensation not paid in money; provided however, that earnable compensation during any one year shall not include any part of the compensation received by a teacher in excess of

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twelve hundred dollars (\$1,200.00) and all compensation received by a teacher in any one year excess of twelve hundred dollars (\$1,200.00) shall be excluded from the definition of 'earnable compensation' as used in this Act."

Paragraph (6) of the same Section as amended reads:

"'Employer' shall mean the State of Florida or the Boards of Public Instruction of all the counties of the State employing teachers subject to the provisions of this Act, or other agency of and within the State by which the teacher is paid."

In my opinion if a teacher is paid compensation in part by the employer as defined, compensation received from any or all of the sources named in the quotation above from your letter, may be included in "earnable compensation" under the Act, total compensation from all sources, however, being subject to the twelve hundred dollar limitation in paragraph (14).

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August 18, 1941.—041-457.

MEMBERSHIP—REQUIREMENTS

QUESTION: Would a Florida teacher be entitled to membership service in the Teachers' Retirement System:

(a) Where a Florida teacher is exchanged for a teacher from another state but the county school board of Florida continues to pay her salary, and the school board of the other state pays the salary of the teacher sent to Florida; and

(b) Where the school board of the state to which the Florida teacher is exchanged pays her salary and the Florida school board pays the salary of the exchanged teacher from the other state.

In both cases the Florida teachers are willing to continue contribution to the Retirement System.

To Hon. Bryan Willis, Actuary, Teachers' Retirement System:

(a) In my opinion in the case in which the Florida teacher's salary is paid by the county board of public instruction in Florida during the period of the exchange, such teacher is entitled to membership in the Florida Teachers' Retirement System. In view of the fact, however, that this case may possibly be regarded as a case of doubt within the meaning of Section 1 of Chapter 19014, as amended by Section 1 of Chapter 20749 in paragraph (4) I would suggest that the board of trustees determine whether the teacher in question is a teacher as defined in that paragraph.

(b) In the case of the Florida teacher whose salary is paid by a school board in another State, it is my opinion that such teacher is entitled to membership service in the Florida Teachers' Retirement System if she obtains a professional leave of absence and files with the Board of Trustees before the next contribution is due an application to continue her membership during the period of her professional leave of absence to teach in the other state, in accordance with the provisions of Section 5 of Chapter 19014, as amended by Section 2 of Chapter 20749.

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April 22, 1942.—042-231.

MEMBERSHIP—REQUIREMENTS

QUESTION: (1) Is a person who taught at any time during the school years 1936-37, 1937-38 or 1938-39 a member of the teachers' retirement system if he did not file a notice of his election not to be covered in membership?

(2) If such person is a member, must he enroll, as provided in Section 557 of the School Code, before July 1, 1940, in order to receive credit for prior service, or may he enroll at any time thereafter and receive credit for such service?

(3) Would the fact that the teacher was unemployed during the years 1939-40 and 1940-41 change the result?

(4) Is a wife, who is a member of the teachers' retirement system and who has been compelled to give up her teaching position either to be with her husband or to run his business while he is in some branch of the military service, and is therefore continuously unemployed as a teacher for more than two years, to be dropped as a member of the retirement system? Also, what application does Section 2, Chapter 20749, Laws of Florida, 1941 have?

To Hon. Bryan Willis, Actuary, Teachers' Retirement System, Tallahassee, Florida:

(1) Section 556 (1) (a) provides that all persons who were teachers at any time during the school year of 1936-37, or 1937-38, or 1938-39, shall become members as of July 1, 1939, unless, prior to December 1, 1939, any such teacher shall file . . . a notice of his election not to be covered in membership . . .

Section 556 (2) provides that a teacher whose membership in the retirement system is contingent on his own election and who elects not to become a member may thereafter apply for and be admitted to membership, but no such teacher shall receive prior service credit unless he is admitted to membership as of a date before the first day of July, nineteen hundred and forty.

A person who taught at any time during any of the three years mentioned is a member of the retirement system if he did not file a notice of non-election, as provided in Section 556 (1) (a) of the School Code.

(2) Section 557 (1) of the School Code provides: ". . . If a member was a teacher during the school year 1936-1937, or 1937-1938, or 1938-1939 and becomes a member before the first day of July nineteen hundred and forty, he shall itemize . . . all service as a teacher" on the application required to be filed with the Board of Trustees. This section also provides: "Until such application is filed no teacher nor his beneficiary shall be eligible to receive any benefits under this Act."

It is my opinion that although the filing of such application before July 1, 1940, is a condition precedent to the receiving of any benefits under the retirement act, it is not a condition to the receiving credit for prior service. In other words, if he taught during any one of the three years mentioned and became a member before July 1, 1940, which could be automatic under the terms of Section 556 of the School Code, he is entitled to credit for prior service and should itemize such on his appli-

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cation; and until he files the application described in Section 557 (1) he is not entitled to receive any benefits under the Act.

(3) I assume that the teacher was again employed for the school year 1941-1942. Section 556 (3) of the School Code provides: "The membership of any person in the retirement system shall cease if he shall be continuously unemployed as a teacher for a period of more than two years;"

Although the Teachers' Retirement Act became effective on July 1, 1939, it was not placed in operation by the Board of Trustees until January 1, 1940. It would, therefore, have been impossible for any teacher to comply with its provisions prior to January 1, 1940. Accordingly, in my opinion the two year period of unemployment referred to in Section 556 (3) of the School Code could not begin until January 1, 1940. In the situation you describe then, the period of unemployment extended from January 1, 1940, to September, 1941, which would not be two years and would not affect the membership of such teacher in the teachers' retirement system.

(4) This statute provides that the requirement that the membership of any person in the retirement system shall cease if he shall be continuously unemployed as a teacher for a period of more than two years "shall not apply to a member of the retirement system who ceases to teach for reasons of military or naval service or professional leave of absence if he files with the Board of Trustees before his next contribution is due an application to continue his membership during the period of his military or naval service or professional leave of absence." In my opinion this provision, insofar as it relates to one who ceases to teach for reasons of military or naval service, does not apply to a wife who leaves her teaching position to be with her husband or to operate his business while he is in some branch of the military service. The legislature rather contemplated that this should apply to the person who actually joins some branch of the armed service.

It is possible, however, that the wife might obtain a professional leave of absence in order to operate her husband's business, in which case she would come within the above exception. Professional leave is provided for under Section 539 of the School Code as amended by Chapter 20970, Laws of Florida, 1941. Although such professional leave may be granted for a period of not to exceed one year, there is no prohibition against the renewal of such professional leave for a similar period at the expiration of the year for which it is granted.

Section 554 of the School Code provides: "Subject to the limitation of this Act the Board of Trustees shall from time to time establish rules and regulations for the administration and transaction of the business of the retirement system." There are a number of problems arising in connection with the war emergency similar to the one which you mention in your question which are not covered by the Teachers' Retirement Act, which are properly subject to the rule-making power of the Board of Trustees. This rule-making power was obviously conferred upon the Board of Trustees to meet just such extraordinary situations. In my opinion, therefore, if a wife in the situation you describe in your question cannot obtain or qualify for professional leave, this matter should be presented to the Board of Trustees so that the Board may determine whether it wishes to promulgate a regulation concerning the matter.

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May 22, 1942.—042-254.

TEACHER—DEFINITION; UNEMPLOYMENT PERIOD

QUESTION: (1) Is a person employed as a bookkeeper or in any other capacity by the County Board of Public Instruction covered by the term "teachers" as defined by the school code and, therefore, eligible to membership in the Teachers' Retirement System?

(2) Must the membership of a teacher in the Teachers' Retirement System cease if such teacher be unemployed for two consecutive school years, although such teacher began teaching at the beginning of the third year?

To Hon. Bryan Willis, Actuary, Teachers' Retirement System:

(1) In my opinion the words "any member of the teaching or professional staff of any public free school of any county school system" do not contemplate the inclusion of a bookkeeper or one employed in any clerical capacity in the office of the county board of public instruction. These words rather cover only persons actually engaged in instructional work or in professional educational pursuits. I am further of the opinion that this interpretation would not in any way be affected by the fact that the person involved had previously taught in the public schools of Florida and has a teacher's certificate.

(2) Section 556 (3) of the School Code provides that the membership of a person in the teachers' retirement system shall cease if he is continuously unemployed for a period of more than two years. The question is, therefore, what constitutes two years of such unemployment.

In my opinion this section contemplates that a year of unemployment is a calendar year measured from the beginning of one school year to the beginning of the next school year. It is a matter of common knowledge that teachers are employed to begin work with the beginning of the school year, usually in September, although their services are normally performed only until the close of the school year the following May or June. The teacher cannot work during the summer months following, inasmuch as the schools are in vacation. I think, therefore, that the vacation period following any school year should be included as a part of that year in computing the period of unemployment under Section 556 (3).

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July 24, 1941.—041-393.

A. & M. COLLEGE FOR NEGROES—EMPLOYEES SALARIES

QUESTION: Can the amounts set forth in the expense budget as salaries for the respective employees and officers of A. & M. College for Negroes be legally paid, and has the Budget Commission authority to approve the same?

To Hon. F. C. Elliot, Secretary to Budget Commission:

By the phrase "expense budget" I assume you mean the report to the Legislature of 1941 of the Budget Commission of the State of Florida.

In the light of the decisions of the Supreme Court of Florida in the cases of State, ex rel. Williams vs. Lee, 191 So. 697, 140 Fla. 380; State, ex rel. Neill vs. Lee, 200 So. 701, and State, ex rel. Knott vs. Lee, 197 So.

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681, construing the following language in Section 11 (a) of the General Appropriation Bill of 1939, repeated verbatim in Section 11 of the 1941 Appropriation Bill except for the year named, to-wit:

"Where the salary of any officer or employee of the State has not been changed by an Act out of the Legislature of 1939, the appropriation for salaries respecting such officer or employee shall control the salary or compensation to be paid such officer or employee."

and accepting, for the purpose at hand, these decisions as controlling the present situation, I am of the opinion, and you are so advised;

That when and if the Budget Commission examines the reports of the various departments involved in your inquiry, as required by Section 8 of Chapter 20980, Acts of 1941, the Budget Commission report to the Legislature of 1941, and the Appropriation Bill of 1941, and finds that the appropriations for such departments cover the salaries intended to be fixed by the Legislature for the officers and/or employees named, it should so report to the Comptroller, whereupon it would be incumbent upon the Comptroller to draw his warrant for the salaries of the respective officers and employees in accordance with the findings of the Budget Commission, my interpretation of the decisions cited being that in cases where the salary of a particular office or employment is itemized and the appropriation is sufficient to cover it, that is the salary to be paid.

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April 21, 1942.—042-197.

AGRICULTURAL COLLEGE FUND—DISPOSITION OF EXCESS INTEREST

QUESTION: In view of the provisions of Chapter 19137, Acts of 1939, should interest derived from the Agricultural College Fund be credited, as in the past, to General Revenue, or should all over \$7,750 be credited to interest, Agricultural College Fund?

To State Board of Education:

The preamble of Chapter 19137, Acts of 1939, recites that the Act of Congress known as the Morrill-Land Grant Act of 1862, granted lands to the State of Florida for the establishment of a perpetual fund to support colleges instructing in agriculture and mechanical arts, which was accepted and assented to by the Legislature of this State.

The total par value of the securities in this fund, known as the Agricultural College Fund, is recited in said preamble to be \$155,000. The preamble likewise recites that the acceptance of this grant obligated the state to invest the funds therefrom in stock yielding not less than 5% upon the par value thereof, or \$7,750 per year, and to replace any portion of such interest which by any contingency might be lost.

In order to maintain this obligation and prevent the interest from falling below \$7,750 per year, the Legislature, in 1939, by said Chapter 19137, made a continuing annual appropriation to the Agricultural College Fund in the sum of \$7,750 from the General Revenue Fund.

This Act also provides that the interest annually received on the Agricultural College Fund shall be transferred, in a sum not to exceed \$7,750 annually, to the General Revenue Fund.

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The purpose of this Act is to insure interest to the Agricultural College Fund in the sum of \$7,750 per year, and the General Revenue Fund is therefore liable each year for that amount, but is to be repaid during that year up to the amount of \$7,750 from the interest received from the assets of the Agricultural College Fund.

The apparent intention of the Legislature in the enactment of Chapter 19137, Acts of 1939, was to guarantee interest on the Agricultural College Fund to the extent of 5% per annum, and the amounts transferred to the Agricultural College Fund from the General Revenue Fund should be repaid from interest collected on the Agricultural College Fund. The use of such interest, even to repay the General Revenue Fund for advancements made in prior years, would not, in my opinion, violate the obligations assumed by the State in accepting the Morrill-Land Grant, because in any event the Agricultural College Fund would have the benefit of the 5% interest rate required by Congress. In the absence of the continuing appropriation, the State would be liable only to the extent of the difference between the actual interest collected on the Agricultural College Fund and the required yield at 5%. The Act making the continuing appropriation is intended merely to guarantee the 5% yield, and to authorize the repayment of advancements from the general revenue fund.

It is, therefore, my opinion that the \$7,750 continuing the annual appropriation from the General Revenue Fund may be repaid annually from interest received on the Agricultural College Fund, and that the amounts received annually in excess of said \$7,750 as interest on said fund should be credited to interest, Agricultural College Fund, which fund may in turn be used to repay the General Revenue Fund for any deficits which may be brought forward from past years in the General Revenue Fund by reason of transfers from that fund to the Agricultural College Fund in excess of the interest collected on the latter fund.

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August 7, 1941.—041-433.

AGRICULTURAL EXPERIMENT STATION—VALIDITY OF CONTRACT

QUESTION: The Agricultural Experiment Station desires to enter into a contract with the City of Belle Glade for the installation of a pipe line and purchase of water from the City. Under the conditions hereinbelow set forth, is such contract valid?

To Dr. Wilmon Newell, Director Agricultural Experiment Station:

The Board of Control has authorized the Everglades Experiment Station to purchase and install a six inch water pipe line from the town limits of the City of Belle Glade to the Experiment Station property in order that the station might purchase water from the City, there being no other adequate supply of suitable water available. The conditions are that the town will purchase the pipe by crediting the Experiment Station up to forty per cent on each monthly water bill with a minimum charge of Fifty Dollars, and that the town will have the right to tap into the pipe for other customers between the town limits and the Experiment Station property. Is the following provision valid:

"If the Experiment Station becomes permanently closed and the monthly payments are not made, the pipe automatically becomes the property of the town. If for any reason the pipe is not paid for within

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twenty years out of the 40% deducted towards the cost of the pipe, the pipe will nevertheless become the property of the town at that time."

I believe that the quoted provision is valid if the contract entered into with the City of Belle Glade is executed by the State Board of Control and the State Board of Education.

Section 35 of the Buckman Act (Section 785, C.G.L. 1927) provides that the State Board of Control shall:

"... make purchases of land and tenements, and to contract for the sale and disposal of the same, but the title to all such donations and property, however acquired, shall be vested in the State Board of Education, and shall only be transferred and conveyed by it, . . ."

In view of the fact that the pipe line in question would likely be held to be a part of the land I recommend that the contract be signed by the State Board of Education under the above quoted provision.

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July 14, 1942.—042-352.

EVERGLADES EXPERIMENT STATION—ANNUAL APPROPRIATION

QUESTION: The Commissioners of the Everglades Drainage District wish to pay the annual appropriation of \$5,000 from the Drainage District funds to the Everglades Experiment Station as provided by Chapter 8442, Laws of Florida, 1921. Should this appropriation be made from the "administration tax" raised by ad valorem levy, which is scarcely adequate, or may it be paid from the "debt service fund" which results from the acreage taxes and which now has a substantial surplus?

To Hon. J. E. Beardsley, General Manager, Everglades Drainage District:

Section 6, Chapter 8442, Laws of Florida, 1921, provides that \$5,000 annually shall be paid by the Commissioners of the Everglades Drainage District to the Everglades Experiment Station, "all of said appropriations being from any funds in the hands of the said board." In 1931 the Legislature, by Chapter 14717, completely revamped the Everglades Drainage District Act and provided that most of the acreage taxes would constitute the "debt service tax" which was to be used to "pay the principal and interest of all obligations of Everglades Drainage District heretofore incurred and now outstanding" (Section 7). A small acreage tax was levied "for the purpose of paying the cost of administering the affairs of the district generally" (Section 8). The Everglades Drainage District Act was again substantially revised by Chapter 20658, Laws of Florida, 1941. Under Section 2 of this Act the "debt service tax" consumes all of the acreage taxes and the purpose for which it is to be used is the same as in the 1931 Act. Section 7 of the 1941 Act converts the administration tax into an ad valorem levy to be used for the same purpose as that expressed in Section 8 of the 1931 Act.

Since the 1921 Act provides that this appropriation to the Everglades Experiment Station shall be paid from *any funds* in the hands of the Board of Commissioners of the Everglades Drainage District, since this appropriation constitutes a statutory obligation against the Everglades Drainage District and is, therefore, within the purpose for which the "debt service tax" may be used, and since most of the debts of the Everglades Drainage District have been incurred subsequent to the 1921 act making the appropriation, it is my opinion that this appropriation may be paid from the fund yielded by the acreage taxes levied for the

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debt service fund. I think, also that the appropriation may be paid, if the Board of Commissioners so desires, from the proceeds of the administration tax.

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October 22, 1941.—041-548-1.

EX-CONFEDERATE—SOLDIERS' AND SAILORS' HOME—INVESTMENT OF ENDOWMENT FUND

QUESTION: What are the requirements for the investment of funds belonging to Ex-Confederate Soldiers' and Sailors' Endowment Fund?

To Hon. J. Edwin Larson, State Treasurer:

Section 2126, Compiled General Laws, directing you to invest these funds is silent as to the nature or requirements the investment shall meet.

It is my opinion that you may invest these funds in securities, or deposit them in qualified banks, as a reasonably prudent business man might do under the same or similar circumstances. It is my advice, in view of my inability to find any decision of our courts on this question, that you confine your investment of these funds to that class of securities which are acceptable as security to secure the safety of deposits of State funds; to-wit:

Bonds of the United States, of the several States, county and municipal bonds, county or county school time warrants issued by any one of the counties or cities of the State of Florida, bonds or obligations issued by a Housing Authority pursuant to the Housing Authorities Law of this State, or issued by any public Housing Authority or agency in the United States, when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the United States Government or any agency thereof.

(Section 174, Compiled General Laws, 1927; Section 7100 (3-nn) 1940 Supp.)

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September 15, 1941.—041-548.

EX-CONFEDERATE SOLDIERS' AND SAILORS' HOME—STATUS OF SCHOLARSHIP FUND

QUESTION: Exact status of scholarship fund derived from sale of Old Soldiers' and Sailors' Home formerly used by Confederate Veterans in regard to:

- (1) Method of setting up committee to award scholarships;
- (2) When funds shall be available;
- (3) When competitive examinations shall be given;
- (4) What authority the United Daughters of the Confederacy will have in any of these matters.

To Hon. Colin English, State Superintendent of Public Instruction:

- (1) There is no provision in the law as to the setting up of a committee but the matter of the awarding of the scholarships upon com-

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petitive examination is to be governed by rules and regulations to be adopted by the State Board of Education.

(2) The sum of \$13,313.80 has been deposited by the State Treasurer in a fund known as the "Ex-Confederate Soldiers' and Sailors' Home Endowment Fund." In addition, the Treasurer has in his possession a deed from the Old Confederate Soldiers' and Sailors' Home Association to the Board of Commissioners of State Institutions dated February 28, 1940. Under Chapter 8505, Acts of 1921, the Board of Commissioners of State Institutions is required to deposit all of the assets, real and personal, coming into their hands and convert the same into cash. The statute then provides that this cash shall be deposited in the fund mentioned and should then be invested by the State Treasurer, the proceeds from which are to be used for the endowment of a scholarship or scholarships in the University of Florida and the Florida State College for Women. The funds for the scholarships are thus available when income is received from these investments.

(3) Competitive examinations are to be given at such time and place and under such conditions as the State Board of Education may provide by rules and regulations.

(4) The United Daughters of the Confederacy will have no authority in any of these matters unless the State Board of Education sees fit to confer such authority upon that organization under its power to adopt rules and regulations governing the competitive examinations.

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July 3, 1942.—042-333.

FLORIDA STATE COLLEGE FOR WOMEN—BENEFICIARY UNDER TRUST

QUESTIONS: (1) If an individual expects to name the Florida State College for Women as a beneficiary under his will with a definite amount of stock or cash, the income from which is to be used as a scholarship fund, how should this fund be designated in the will?

(2) Would such funds under existing inheritance laws be deductible as charitable contribution?

To Dr. D. S. Campbell, President, Florida State College for Women:

(1) In my opinion the bequest should be made to the State Board of Control as trustees for the Florida State College for Women to carry out the objects of the bequest. If it is thought that a local board might be in better position to administer the fund, it might be well to name the President, the Dean of the College of Arts and Sciences, and the Business Manager of the Florida State College for Women, or such persons as you think desirable, as trustees for the same purposes. The will should name the trustees, carefully describe the gift, and specifically set out the objects for which the fund is to be used.

(2) The present estate tax laws permit such a gift to be deducted from the gross estate of the decedent for the purposes of determining the amount of the estate tax. To avoid any question about the matter, the will should be specific in the manner indicated in my answer to your first question.

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July 23, 1941.—041-395.

STUDENTS—RESIDENCE AFFIDAVITS

QUESTION: Under the provisions of Chapter 20913, Laws of Florida, Acts of 1941, should the authorities of the University of Florida and the Florida State College for Women require every student who is twenty-one years of age or over who applies for admission to sign an affidavit, and should the same requirement be made as to the parents or guardian of applicants under the age of twenty-one?

To Hon. J. T. Diamond, Secretary, Board of Control:

Section 1 of Chapter 20914 reads in part that:

"in all applications for admission by students as citizens of the State of Florida, the applicant, if twenty-one years of age, or, if a minor, his parents or guardian, shall make and file with such application in writing a statement under oath that such applicant is a bona fide citizen and resident of the State of Florida and entitled as such to admission upon the terms and conditions prescribed for citizens and residents of the State."

These affidavits should be required under the conditions named in the Act, from the applicant if twenty-one years of age or over, or if he is under twenty-one, from his parents or guardian.

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March 20, 1941.—041-156.

STUDENTS—RESIDENCE REQUIREMENTS

QUESTION: D. B. Logan has applied for admission to the University of Florida as a resident student and has asked to be excused from paying the non-resident tuition fee of \$100.00 a year. What matters should be considered in determining the question of residence?

To Hon. J. T. Diamond, Secretary, Board of Control:

Section 24 of the Buckman Act (Section 768, Compiled General Laws) provides:

"Admission of students from other States; admission of students from Florida. In case of the admission of students to either the said university or college from other states, the same may be admitted by and with the consent and upon the certificate of the Board of Control upon such terms as to tuition, board, etc., as the said Board may from time to time establish.

"The several departments of the said college and of the said university shall be open to applicants for admission who are citizens of this State at the lowest rate and expense consistent with the welfare and efficiency of the respective institutions, and as may be established from time to time by the said Board . . ." (Emphasis ours.)

The courts of this State have not passed upon this provision, but in my opinion the emphasized language refers to residence—that is, the language in the first sentence refers to non-residents of Florida, and that in the second sentence refers to residents of this State.

The question of whether a person is a resident of a State is often very difficult, the question being of both law and fact. Assuming that

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Mr. Logan is still under twenty-one years of age and has not had his minority removed, his residence would follow that of his father. This rule was pointed out by the Florida Supreme Court in *Beekman vs. Beekman*, 53 Fla. 858, 43 So. 923, as follows:

"Under the laws of Florida the domicile of the father is the domicile of his minor children, and such minors are incapable in Florida of making choice of a domicile here independently of the domicile of their father, and such disability continues here with all minors, be they male or female, until they arrive at the age of 21 years."

* * *

"But, besides this, the mere intention to acquire a new domicile, unaccompanied by an actual removal, avails nothing; neither does the fact of removal, without the intention, avail. The *factum et animus* must both exist together. *Smith & Armstead vs. Croom*, 7 Fla. 81."

Mr. Logan's letter does not contain sufficient facts upon which to determine whether or not he is a resident of this State. It is not clear from his letter what his age is, though it is apparently around twenty-one years. This is important, for if he has attained his majority he is then capable of an independent intention to reside in Florida, regardless of the residence of his father.

The letter is also vague as to exactly what periods of time Mr. Logan's father was actually in Florida.

As the Supreme Court held in the above case, and as it has held in a number of subsequent cases, the intention to reside in Florida is not alone sufficient to establish residence, but such intention must be accompanied by an actual removal to this State. When, however, such removal has taken place, and there has been the intention to reside, thereafter temporary absences for business or other reasons, if there is a bona fide intention to return, do not have the effect of changing the residence.

I gather from Mr. Logan's letter that his father spent five months in Florida in the year 1909, and that his father "spent a great part of more than thirty years in Florida." This latter statement is vague, and more details should be secured. However, for the present purpose, the important dates are between 1937, when Mr. Logan entered the University, and the present time. It is not clear from the letter when Mr. Logan's father left Florida, and whether he has been in Kentucky since the time of leaving.

Mr. Logan mentions that during the years 1936 to 1939 his father drove a car with Florida tags attached. This is some evidence of intention to reside in this State, but Mr. Logan does not state as to what tags were attached to his father's car during 1940 and this year.

It is quite possible that Mr. Logan's father was a resident of this State from 1937 to the present time. If the father actually removed to Florida before Mr. Logan entered the University, and the removal was accompanied by the intention to reside, and if nothing has happened to change that intention, a temporary absence in Kentucky for business reasons would not change the residence if the father actually has the intention to return to Florida.

The matters stated in Mr. Logan's letter, however, are not sufficiently definite to base either a finding of residence or non-residence. Additional facts should be obtained to assist in this determination as suggested above.

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April 10, 1941.—041-189.

STUDENTS—RESIDENCE REQUIREMENTS

QUESTION: How may the residence of D. B. Logan, a student of the University of Florida, be established under the facts set out below?

To Hon. J. T. Diamond, Secretary, Board of Control:

In our letter to you dated March 20th, we discussed the rules in Florida to be applied in determining whether a person is a resident of this State. We pointed out that the domicile of the father is the domicile of his minor children until they arrive at the age of twenty-one years, and that both the intention to reside and an actual removal to this State must occur, but that if there is such removal and intention, temporary absences thereafter for business or other reasons do not have the effect of changing the residence if there is a bona fide intention to return.

In the first place, I call your attention to the fact that Mr. Logan states that he was born on January 6, 1920, and so now has attained his majority. Therefore, since January 6, 1941, Mr. Logan has been able to establish his own residence independently of the residence of his father. If Mr. Logan has lived in this state since January 6th of this year, and has had the intention to reside here, he has been unquestionably a resident of this State since that time.

The question is more difficult as to the determination of the residence of Mr. Logan's father, whose residence is determinative of his son's residence while the son is a minor.

It appears from the file that the father moved to Florida on June 1, 1936, and stayed here until early in 1937. Mr. Logan states that since the time his father took his residence in this State in June of 1936, he has made trips to Kentucky at various times. Other information in the file seems to indicate that the father lived in this State only during the period mentioned in 1936 and 1937. It is quite possible, of course, for a man to reside in Florida, although he has been obliged to make extended trips to another part of the country. If the father in this case has not returned to Florida during the past four years, that would be a factor important in considering the question of his intent to reside in this state.

To your letter of April 4th, you attached a registration certificate in Pinellas County, dated 1937, issued to the father. This is a factor that helps support the view that the father was a resident at least in 1937. To your letter is also attached a certificate of the county judge in Kentucky, exempting the father from certain taxes on the ground that he is a non-resident of Kentucky. This certificate is dated February 25, 1941. Other statements made by Mr. Logan tend to support the view that the father was a resident of this State.

Judging merely from the facts that have been so far presented, I think a prima facie case of residence of Mr. Logan's father is made. However, the case is rather weak, and it seems quite possible that if additional facts were secured, the prima facie case may be overcome.

Before a final decision can be made on this question, I suggest that additional facts be sought such as on the following matters:

(1) A clear statement of when the father has been in Florida from early in 1937 to January 6, 1941, with the approximate dates showing how long he was in this State and for what purpose.

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(2) A more detailed explanation of why the father has found it necessary to stay in Kentucky from 1937 to 1941, all or substantially all of the time.

(3) Additional facts showing the intention to reside in Florida. The registration to vote for 1937 is helpful as to that year, but it seems insufficient to cover the subsequent years. A reference to additional certificates or documents would be useful; for instance, where did the father file his income tax during the years 1937 to 1941? Did he use his Florida address for other mail than that sent from the University?

In summary, then, I feel that a rather more candid presentation of the facts of this case would be helpful in determining the question of residence. It would also be useful to receive a letter from Mr. Logan's father, who would be in the best position to say what his intention has been.

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February 27, 1941.—041-89.

UNIVERSITY OF FLORIDA—FEES—AUTHORITY

QUESTION: Has the Board of Control legal authority to compel every student enrolling in the University of Florida to pay the infirmity fee, the swimming pool fee, and the student activity fee?

To Hon. J. T. Diamond, Secretary, Board of Control:

The Board has ample authority to compel the collection of these fees.

Although there is no decision of the Florida Supreme Court on this question, in several recent cases from other states, the Courts have directly held that boards similar to the Board of Control have the right to insist upon the payment of fees for extra-curricular activities as a prerequisite to admission to a State University. Some of these cases are:

Rheam vs. Board of Regents of University of Oklahoma, (Okla., 1933), 18 Pac. 2d 535,

State vs. Regents of University of Georgia, (Ga. 1934), 175 S. E. 567,

State ex rel Veeder, vs. State Board of Education, (Montana, 1934), 33 Pac. 2d 516,

Rainey, et al, as Officers and Members of the Board of Regents of the University of Texas vs. Malone, (Texas, 1940), 141 S. W. 713.

The only exception to this holding is where the Constitution or the statutes of a State specifically provide that a student may enter the State University upon his application thereto, or may enter the University without the payment of any fee. Even where the Constitution or statutes forbid the requirement of any instructional or tuition fee, it has been held that this does not prevent the requirement of a fee to cover extra-curricular activities.

Not only is there no constitutional or statutory provision in Florida prohibiting the requirement of a fee from students entering the State University, but the statutes appear to contemplate that such a fee may be charged. Section 216 of the School Code provides, as to elementary and high schools, that no matriculation or tuition fee shall be charged pupils whose parents are bona fide residents of this State, but in the

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next section, Section 217, it is provided that the institutions of higher learning of Florida "shall be controlled and supported as provided by law."

Section 24 of the Buckman Act (Chapter 5384, Acts of 1905), provides with reference to the Board of Control and the University of Florida:

"The several departments of the said college and of the said University shall be open to applicants for admission who are citizens of this State at the lowest rate and expense consistent with the welfare and efficiency of the respective institutions as may be established from time to time by the said Board."

Section 19 of the Buckman Act as revised, provides:

"The board of control shall have jurisdiction over and complete management and control of all the said several institutions and each and every one of them, to-wit: The University of Florida, the Florida State College for Women, Florida Agricultural and Mechanical College for Negroes, and the Institution for the Blind, Deaf and Dumb, and is hereby invested with full power and authority to make all rules and regulations necessary for their governance not inconsistent with the general rules and regulations made or which may be made at any joint meeting of the said board with the State board of education . . ."

Section 23 of the Buckman Act provides in part:

"No student shall be admitted to the University of Florida who has not passed a satisfactory examination at some high school and through the twelfth grade as now established, or some other institution of learning having an equivalent of instruction to the twelfth grade. The State board of control may change the grade at any time they may see fit as a prerequisite to such entrance. No person shall be admitted to said university except white male students having the prerequisite qualifications to which the said board of control may add others in their judgment and discretion, except to the normal department thereof for the instruction and education of teachers; when both male and female students may be admitted to that department."

Section 2 of Chapter 10288, Acts of 1925, provides:

"Women who are eligible to take such subjects and courses as are mentioned in section 791 shall have the right to enroll in the University of Florida therefor and to take them under the same regulations as to fees and with the same privileges as to instruction, credits and degrees as other students of said University."

All of the above statutory provisions clearly contemplate that the Board of Control has the authority to require the payment of the infirmary, swimming pool, and student activity fee at the University of Florida.

Therefore the Board of Control has ample authority to require the payment of those fees.

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April 20, 1942.—042-193.

UNIVERSITY OF FLORIDA—LEASE OF SEAGLE BUILDING

QUESTION: In effecting a lease by the United States Government for space in the John F. Seagle Building at the University of Florida in whom is the legal title?

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To Hon. J. T. Diamond, Secretary, Board of Control:

Inasmuch as the legal title to the John F. Seagle Building at the University of Florida is held by the State Board of Education, my opinion is that the lease should be executed by the State Board of Education as lessor, instead of by the State Board of Control.

INSTITUTIONS OF HIGHER LEARNING

January 16, 1941.—041-13.

UNIVERSITY OF FLORIDA—LEGALITY OF CONSTITUTION

QUESTION: Do any of the provisions of the Constitution of the University of Florida infringe upon the statutory and constitutional law of this State?

To State Board of Education:

Section 778, Compiled General Laws, 1927, vests complete control and management of the University in the Board of Control and the State Board of Education. Therefore, if there is anything in the Constitution of the University of Florida which conflicts with this control such matter would necessarily be void.

An examination of the Constitution of the University and the amendments thereto reveals that it was approved by the Board of Control on May 13, 1929. Section 778 above referred to provides in part as follows:

"The Board of Control . . . is hereby vested with the full power and authority to make all rules and regulations necessary for their governance . . ."

Under this section of the law the Board of Control, in my opinion, would have the right to approve the Constitution of the University of Florida in its present form, as I have examined the same and do not find anything therein which is inconsistent within the law of this state.

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June 7, 1941.—041-316.

UNIVERSITY OF FLORIDA—NEGRO ATTENDANCE

QUESTION: Preston A. Peterson, a negro, made application to attend the University of Florida. What should govern the Board of Control in determining whether or not such application should be accepted?

To Hon. J. T. Diamond, Secretary, Board of Control:

I am going to reply to the Board's request from two standpoints. First, the law of the situation, since your request expresses the desire for "legal advice in the premises," and second, the practical side as I see it.

(1) The law.

In the case of *Missouri ex rel. Gaines vs. Canada*, 305 U. S. 337, 83 L. Ed. 208, 59 S. Ct. 232, it appears that Lloyd Gaines, a negro, had been refused admission to the Law School of the University of Missouri, and the Court held that such refusal amounted to a discrimination which would constitute a denial of equal protection if not relieved by other circumstances or by some existing provisions of law. The opinion also

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states in substance that it does not appear that a "clear and unmistakable disregard of rights secured by the supreme law of the land" would result from a failure on the part of State authorities to keep and maintain in idleness and non-use facilities for negroes that had not been required or indicated as being necessary.

I believe, under this decision, however, and for other applicable reasons, that a negro citizen of Florida is entitled under the United States Constitution to be admitted to schools or departments in the State University in the absence of other and adequate provision for the training desired in any particular case within the State in other state institutions. I also believe under this decision that State authorities are to be given a reasonable opportunity to provide similar facilities in negro institutions or for negroes, especially when this particular training for the negroes seeking same is demanded for the first time.

(2) Practical Side to the Situation Created by this Request.

Both the West Point Military Academy and the United States Naval Academy are open alike on the same basis to white and colored cadets. But in the history of these two government schools, the last forty years, no cadet of the negro race has entered either of these academies and remained there to complete his military course of education, according to the information before me on this subject. The reason for this is that negroes have not found their domicile at either of these Institutions, after entrance upon same, to be complemented with any association that made them desire to remain. This does not mean that they were mistreated. As I see it, it simply means that being of the negro race and finding no negroes in any companionable numbers there, they were isolated and found themselves in an unpleasant atmosphere, and did not remain. The principle attending their experiences, if applied at the University of Florida in the instant case, in my opinion, will work out the same results.

You may have to construct a one- or two-room dormitory and furnish it just like your other dormitory rooms are furnished, but mark it for negro students. You may have to put a segregated portion in a dining room and mark it for negro students. You may have to put a sign in the class rooms segregating the two races, showing one space for negroes and the other for white students, but in my opinion this will not have to be made a continuous practice, and I know of no better time to have to handle such a situation than during a summer school session.

It is not necessary, in my opinion, either, to anticipate any further similar race segregation problem. We need only to handle these as they present themselves.

Take the history of and experience with those laws heretofore known as Jim Crow laws in the use of street cars and trains by negroes and white people jointly. Segregation, and signs definitely determining the segregation areas, have served to meet the problems which they present, and we have not had to run one street car for negroes and another one for whites, nor one train for negroes and another one for whites.

The race prejudice is inherent in both races. The whites are the dominant race in this country, and of course control the handling of the prejudice. Instead of allowing one negro to put the University of Florida, the State Board of Control, the State Board of Education, so to speak, on a spot, my thought is that the tables might be turned and the spotting reversed.

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BOARD OF CONTROL

September 29, 1942.—042-469.

A. & M. COLLEGE FOR NEGROES—WAR DAMAGE INSURANCE

QUESTION: Can the Board of Control be required to place war damage insurance on the two Florida A. & M. College PWA dormitories for the protection of revenue certificate holders?

To Hon. J. T. Diamond, Secretary, Board of Control:

Paragraph 9 (g) of the resolution adopted February 4, 1938, authorizing the issuance of revenue certificates to finance the cost of construction of such buildings provides in part, "that it (the Board) will maintain insurance on the project for the benefit of the holders of the certificates so long as any of the certificates or the interest shall remain outstanding or unpaid, of the kind and in an amount which usually would be carried by a private corporation operating a similar type of undertaking."

I am informed that all insurance companies have considered war risks, as the same relate to invasion, as not insurable and have never issued any policies giving such coverage.

It appears from the face of the war damage insurance policies that indemnity is payable only for loss "which may result from enemy attack including any action taken by the military, naval or air force of the United States in resisting enemy attack." The War Damage Corporation did not come into existence until it was created by Act of Congress, approved March 27, 1942, and such insurance has only been available for purchase since July 1, 1942.

There being a total absence of any provision in the resolution which would require thereafter other insurance considered as necessary to protect the security behind said certificates as against any unforeseen and then not considered hazard, contingency or emergency, and war damage insurance being an unknown and non-existent form of insurance at the time of adoption of said resolution and issuance of said certificates and not available to be carried on a similar type of undertaking, it was not contemplated by the parties as a necessary type of insurance, and cannot be considered, even by implication, as included in the agreement. It is my opinion, therefore, that you are not and cannot be required to purchase war damage insurance.

It might also be mentioned that the revenue certificates are secured only by a lien on net income and revenue derived from fees and rentals from the use of said buildings. War damage insurance specifically excludes any payment of indemnity for loss of use, profits, etc., by a provision of the policy, as follows:

"No allowance shall be made for compensation for loss of use, loss of profits, loss resulting from delay or deterioration, loss or impairment of market, cessation of work, fixation of price or value, interruption of business or manufacture or occupancy, or for consequential loss."

So, even though the Board should place the requested insurance, it would not indemnify for the loss of the sole security behind the certificates, the income and revenue from the buildings.

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July 1, 1941.—041-365.

**AGRICULTURAL EXTENSION SERVICE—PROPERTY DAMAGE BY
EMPLOYEE**

QUESTION: An employee of the Agricultural Extension Service while on official business and driving his own automobile, ran into a telephone pole in order to avoid a collision caused by two cars coming towards him, one of which was attempting to pass the other. The telephone company charged the employee \$30.00 for the pole and the item was charged to the telephone in his office on the Florida A. & M. College campus. The college paid the telephone bill thinking it was paying the telephone company for work on the line on the campus, submitting a bill to the Agricultural Extension Service for reimbursement and the Agricultural Extension Service declined to reimburse the college for the \$30.00 paid for the pole. Is the Agricultural Extension Service liable?

To Hon. J. T. Diamond, Secretary, Board of Control:

The difficulty in this case is caused by the fact that the telephone company charged the item on the telephone bill, which the company had no right to do. When an employee operating an automobile in the course of his employment is involved in an accident resulting in personal or property damage, his employer is liable for such damage only when it is shown that the employee was guilty of negligence in the operation of the automobile. Until such negligence is found in proper proceedings in the courts, or until a settlement is agreed upon, no contract obligation arises, and hence in this case the telephone company was not authorized to charge the item in question to the telephone bill as if the item were a contract obligation, and you should deduct the amount you have so paid it from its future bills against the Florida A. & M. College until reimbursement has been obtained.

BOARD OF CONTROL

January 10, 1942.—042-4.

ATHLETIC COACH AGREEMENTS—EXECUTION

QUESTION: Has the Board of Control the power and authority to execute the proposed agreement between it and Thomas J. Lieb for a five year contract to continue as athletic coach at the University of Florida?

To Hon. H. P. Adair, Chairman, Board of Control:

I do not think the Board of Control has the power and authority to execute the agreement as drawn for the following reason:

When two-year contracts are made by you with reference to instructors at the University, my opinion is that they should be in harmony with the legislative appropriation biennium. This is in effect stating also that you do not have the power to make, under any circumstances as the law now stands, such contracts for a longer period.

BOARD OF CONTROL

November 14, 1941.—041-647.

EMPLOYEES—DISCHARGE; LIABILITY

QUESTION: An employee of the State School for the Deaf and Blind and of the State Board of Control was discharged before the ex-

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piration of her contract. Assuming this employee has a cause of action, has consent been given by the State to any of its agencies being sued in order to enforce it?

To Hon. H. P. Adair, Chairman, State Board of Control:

Article III, Section 22, of our State Constitution, provides:

"Provision may be made by general law for bringing suit against the State as to all liabilities now existing or hereafter originating."

Section 785 of the Compiled General Laws of 1927, provides with respect to the Board of Control as a body corporate, the following:

"It shall have the power to sue and be sued."

I am of the opinion that this section of the statute constitutes a vesting by the Legislature of the power to sue, and a subjecting to suit, against the Board of Control.

BOARD OF CONTROL

October 20, 1941.—041-622.

RADIO BROADCAST AGREEMENTS—EXECUTION

QUESTION: In agreements between Mutual Broadcasting System, Inc. and the broadcasting station at the University of Florida should the agreement be entered into by the University of Florida or by the State Board of Control in behalf of the State?

To Hon. J. T. Diamond, Secretary, Board of Control:

Section 778, C.G.L. 1927, provides that the State Board of Control has "full management, possession and control of each and every one of the said institutions and every department thereof and the lands, buildings and structures belonging thereto." The power to contract and be contracted with is given the Board of Control by Section 785, C.G.L. 1927, and no such power is given to the University of Florida as such. It is, therefore, my opinion that the proposed agreement, if the substance thereof is acceptable to the Board of Control, should be entered into by the State Board of Control rather than by the University of Florida as the contracting party, in behalf of the State.

MISCELLANEOUS EDUCATIONAL LAWS

May 12, 1941.—041-251.

**COUNTY SUPERINTENDENT OF PUBLIC INSTRUCTION—
COMPENSATION**

QUESTION: What law controls the compensation of the Polk County Superintendent of Public Instruction?

To Hon. Colin English, State Superintendent of Public Instruction:

In 1937 the Legislature of Florida enacted Chapter 17862, fixing the compensation of the County Superintendents of Public Instruction in the counties of the State, which Act was approved by the Governor on June 9, 1937. The same Legislature enacted Chapter 17863, which fixes the compensation of the County Superintendents of Public Instruction in counties having a population of more than 70,000 and not more than 140,000 inhabitants, according to the last preceding State or Federal Census. According to the legislative journals, this Act was presented to

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the Governor on June 2, 1937, but the Legislature adjourned sine die on June 4th, calling into operation the second sentence of the following part of Section 28, Article III of the State Constitution:

"If any bill shall not be returned within five days after it shall have been presented to the Governor (Sunday excepted) the same shall be a law, in like manner as if he had signed it. If the Legislature, by its final adjournment prevent such action, such bill shall be a law, unless the Governor, within ten days after the adjournment, shall file such bill, with his objections thereto, in the office of the Secretary of State, who shall lay the same before the Legislature at its next session, and if the same shall receive two-thirds of the votes present, it shall become a law."

Since the Governor did not approve Chapter 17863, by operation of the Constitution that Act became a law on June 14th, five days after Chapter 17862 became a law. Therefore, assuming Chapter 17863 to be a valid law, that Act controls as to the compensation of county superintendents of public instruction in counties having a population of more than 70,000 and not more than 140,000 inhabitants, according to the last preceding State or Federal Census, and hence is applicable to Polk County which has a population of 86,665, according to the Federal Census of 1940.

MISCELLANEOUS EDUCATIONAL LAWS

November 24, 1941.—041-680.

VOCATIONAL TRAINING SCHOOLS—PART TIME EMPLOYMENT

QUESTION: Instructors in vocational courses have found it desirable to attempt to work out a program in order that pupils would devote a part of their time to vocational training in school and at the same time obtain practical experience in the field. Is there any legal obstacle which would prevent or make impracticable the carrying out of such a program, provided all requirements relating to school attendance are observed?

(a) Would the age provisions of the Child Labor Law apply to employment sponsored as a part of the training program of the pupils?

(b) What would be the responsibility of the school and the cooperating employer for compensation in case of accident?

To Hon. Colin English, State Superintendent of Public Instruction:

(a) The Child Labor Law, as amended by Chapter 20955, Laws of Florida, 1941, definitely enjoins employment of minors of certain ages under numerous conditions specified in this law.

Section 423 (6) (h) of the School Code requires the county board of public instruction to provide for the establishment and maintenance of vocational schools, departments or classes.

Section 500, C. G. L. 1927, provides for the establishment by the county board of public instruction of part time schools under certain conditions in order to furnish "instruction in any subjects designed to encourage the civic or vocational intelligence" of the pupils attending such school.

The legislature, therefore, clearly contemplated the establishment of facilities giving boys and girls of school age an opportunity for vocational education.

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Section 24 of the Child Labor Law, as amended (Chapter 20955, Laws of Florida, 1941, Section 19) provides:

"Nothing in this act shall prevent minors of any age from receiving industrial education furnished by the United States, this State, or any city or town in this State, and duly approved by the State Superintendent of Public Instruction or by any other duly constituted public authority."

Therefore, if any pupil in a regularly established vocational course is employed outside of school on a part time basis as an essential part of the vocational course he is pursuing, and such plan is duly approved by the State Board of Education, the State Superintendent of Public Instruction or the County Superintendent or Board of Public Instruction, such employment is not contrary to the Child Labor Law, regardless of the age of the pupil inasmuch as Section 24 of the Child Labor Law above quoted was designed to prevent the Child Labor Law from in any way obstructing a plan of vocational education.

(b) Unless such pupil were actually employed by the school in which the vocational training was being received, there would be no liability for compensation on the part of the school and in my opinion employment, except as part of an approved vocational training program of a prohibited minor, during vocational tutelage by such school, would not be permissible. However, any employer of such pupil on the basis above indicated would be liable, in case of accident in accordance with the law applicable to employers generally. If the employer were within the terms of the Workmen's Compensation Law, he would be liable under that law in case of an accident injuring such pupil. If the pupil were employed by an employer covered by the terms of the Workmen's Compensation Law on a part time basis in connection with a program of training properly approved as indicated above, the employer would not be subjected to double liability as provided in Section 18 of Chapter 18413, Laws of Florida, 1937, but if the employment were not so approved, such employer would be subjected to the additional liability for compensation under this section.

CHAPTER XIII

MILITIA AND RELATED MATTERS

FLORIDA STATE DEFENSE COUNCIL

October 8, 1942.—042-483.

CIVILIAN DEFENSE OFFICERS—LIABILITY FOR HOSPITAL BILLS

QUESTION: (1) To what extent, if any, is liability incurred by civilian defense officers, workers and agencies where persons injured during an accident, are directed to private hospitals and the patients, or someone for them, fail to make payment for the services rendered by the hospitals?

(2) Should the defense council, or any of its agencies, establish emergency hospitals or first aid stations, equipped with facilities usually found in small hospitals and first aid stations, would the State Defense Council, its agencies, officers and workers be liable for negligence in treating persons admitted thereto for emergency treatment when the injuries are not attributable to the war emergency or enemy action?

To Florida State Defense Council:

The answer to the first question is that no liability for hospital bills is incurred by a civilian defense officer, worker or agency where the injured person is merely directed to the hospital and no agreement is made to pay the bill in default of its payment by the person injured. Since mutual consent is essential to every agreement and an agreement is generally essential to a contract, there can be no binding contract to pay a hospital bill where there is no agreement (17 C.J.S. 478, section 132). The mere direction of an injured person to a hospital does not amount to an agreement to pay for his treatment. The relationship between the hospital and the patient is a contractual one and the hospital must look to the patient, or someone responsible for his care and maintenance, for the payment. In the absence of any agreement on the part of a civilian defense officer, worker or agency to be responsible for the hospital bill there will be no privity of contract between such officer, worker or agency and the hospital.

We are advised that in some states emergency hospitals and first aid stations have been organized and set up under the direction and supervision of civilian defense councils; in most of these cases the money and equipment needed in setting up these hospitals and first aid stations have been donated, in whole or in part, by the people of the community where established and assistance or equipment have been obtained from the Red Cross and other similar organizations. In most cases the hospitals and first aid stations are under the direction and at the disposal of the applicable civilian defense council. These hospitals and first aid stations are set up as a civilian defense measure for the purpose of administering aid to persons injured due to defense activity and during enemy activity. In other words, they are units organized for the purpose of taking care of injuries resulting from acts of war and connected with the war effort, but are not intended to be used in administering aid to persons who may have been injured in automobile accidents which bear no connection with civilian defense activities. In answering the second question above stated we shall consider that your question relates to emergency hospitals and first aid stations similar to those above mentioned.

MILITIA AND RELATED MATTERS—Florida State Defense Council

Suits for damages cannot be maintained against the State Defense Council or its agencies, they being "state agencies." The state and its agencies can only be sued when authorized by statute constitutionally enacted; there is no statute authorizing suits against the State Defense Council or any of its agencies or against the state in connection with the State Defense Council and its agencies (State vs. Atkinson, 136 Fla 528, 188 So. 834, text 838; Kennard vs. State Tuberculosis Board, 129 Fla. 619, 176 So. 872, text 874-5). This only leaves the question of the liability of the officers and workers of the defense council. The officers of the State Defense Council and of the county and other local defense councils are public officers or officers in the nature of public officers.

Public officers when acting in good faith and within the scope of their authority are not liable in private actions, and ordinary, purely ministerial officers are protected in executing orders of their superiors fair on their face even though such orders were erroneously issued by such superiors (46 C.J. 1042, section 326). As a general rule the officers of public institutions are not civilly liable for their mistakes or neglect in the exercise of their discretionary powers because they are acting in the interest of and for the benefit of the public, that is, they are exercising a power governmental in its nature (26 Am. Jur. 598, section 17). But where public officers go outside the scope of their authority or duty, they are not entitled to protection on account of their office and are liable for their acts like any private individual (46 C.J. 1043, section 327; 26 Am. Jur. 598, section 17).

The answer to the second question, therefore, is that the State Defense Council and its agencies are not liable for negligence in treating persons admitted to emergency hospitals and first aid stations established by it whether the injuries are attributable to the war emergency, enemy action or otherwise; while the officers and workers are not liable if they merely fall into error while acting in good faith in the treatment of persons admitted thereto but if they so carelessly and negligently treat the injury as to damage the patient they would be liable irrespective of whether the injury was attributable to war emergency, enemy action or otherwise.

FLORIDA STATE DEFENSE COUNCIL

November 17, 1942.—042-541.

HIGHWAYS—POWER TO CLOSE

QUESTION: Does the Florida State Defense Council have authority, under chapter 20674, laws of Florida, acts of 1941 (sections 249.12-249.16, Florida Statutes, 1941), to authorize the closing of a street or highway, dedicated for public use but never actually used?

To Florida State Defense Council, Tallahassee, Florida:

Where the owner of real property makes a plat of it and divides the land into lots and blocks, intersected by streets, and sells any of the lots with reference to said plat, he will usually be held to have dedicated the streets to public use (18 C.J. 58, section 42) even where the streets have not actually been opened for use when the question of dedication arises (16 C.J. 62, section 48).

Therefore, where streets or highways have been dedicated to public use, although not yet actually opened or used, the Florida State Defense Council has authority, under chapter 20674, laws of Florida, acts of 1941, to authorize and direct the closing of such streets or highways.

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FLORIDA STATE DEFENSE COUNCIL

July 7, 1942.—042-339.

MOTOR VEHICLES—LEASE

QUESTIONS: (1) May the State Defense Council accept the loan or gift of a station wagon for use during the duration of the emergency?

(2) May county and local defense councils accept loans of motor vehicles or lease motor vehicles for the duration of the emergency?

To Florida State Defense Council:

When chapter 20,213, laws of Florida, acts of 1941, is considered as a whole and in connection with the needs it was designed to fulfill, it seems clear that the state defense council, as well as the regional, county and local defense councils, has authority to accept gifts of motor vehicles to be used in connection with state and national defense and may also lease or rent motor vehicles for such purposes.

I see no reason why gifts of motor vehicles may not be made for the duration of the emergency with the provision that when no longer needed for defense purposes the vehicle should revert to the donor.

When the vehicles are taken over by the defense councils the registration of the vehicles should be changed from that of the present owner to that of the defense council.

FLORIDA STATE DEFENSE COUNCIL

October 30, 1942.—042-506.

PHYSICIANS—TREATMENT IN FIRST AID STATIONS

QUESTION: What are the liabilities of members of the medical professions who, under the direction of the State Defense Council or one of its local defense councils, treat or supervise the treatment, in first aid stations set up by or under the direction of the State Defense Council or one of its local defense councils, of persons injured during air raids or other emergencies, for injuries resulting from such treatment?

To Florida State Defense Council, Tallahassee, Florida:

It is common knowledge that during serious air raids and other emergencies, when large numbers of persons may receive injuries requiring first aid and emergency treatment, members of the medical profession, nurses and other persons charged with the rendering of such aid do not have the time for the treatment of each injury in the same manner and with the same care as they would treat like injuries under normal conditions, the chances for error under such circumstances are greater than under normal conditions. To give one injured person the same attention and treatment as would be given under normal conditions might prove fatal to other injured persons for want of treatment.

Medical officers in charge of first aid stations, established by the State Defense Council or its local councils, as well as other persons assisting in the operation of such stations would seem to be officers and employees of institutions set up for and acting in the interest of the public, for which reason it seems that laws applicable to officers and employees of public institutions may be applied.

Public officers when acting in good faith and within the scope of their authority are not liable in private actions, and ordinarily, purely ministerial officers or employees are protected in executing orders of

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their superiors fair on their face, even though such orders were erroneously issued by such superiors (46 C.J. 1042, section 326). As a general rule officers and employees of public institutions are not civilly liable for their mistakes or neglect in the exercise of their discretionary powers, because they are acting in the interest and for the benefit of the public, that is, they are exercising a power governmental in its nature (26 Am. Jur. 598, section 17). But where public officers and employees go outside the scope of their authority or duty they are not entitled to protection on account of their official connection and are liable for their acts like any private individual.

I am, therefore, of the opinion that members of the medical profession who treat or supervise the treatment, in first aid stations set up by or under the direction of the state defense council or one of its local defense councils, of persons injured during air raids or other emergencies, are not liable for injuries resulting from such treatment if they merely fall into error while acting in good faith in the treatment of such persons, but if they so carelessly and negligently treat the injury as to unnecessarily damage the patient they would be liable. In determining whether or not they are guilty of such carelessness as would give rights to suit due consideration should be taken of the surrounding circumstances and conditions under which the treatment was made.

DEFENSE

December 23, 1942.—042-575.

AIR RAID WARDENS—POWERS DURING PRACTICE BLACKOUTS

QUESTION: Do Air Raid Wardens, Police Officers and other like officers and agents, have authority, under the statutes and laws of this State, to enter buildings, either locked or unlocked, for the purpose of turning out burning lights during practice blackouts?

To General Albert H. Blanding, Coordinating Director, Florida State Defense Council, Tallahassee, Florida:

A clear distinction exists between the common law authority of air raid wardens, police officers and other like officers and agents during a practice blackout and during a blackout brought on by an emergency, although no incident may develop from the emergency. During a practice blackout no material damage or loss of life is to be expected because one or more lights are left burning in violation of blackout rules and regulations; while during a blackout consequent upon an emergency, such as reports of unidentified planes approaching a municipality or other populated place, if the lights are permitted to continue to burn material damage and loss of life may ensue because of such burning lights.

The right of such officers and agents to force an entrance to buildings where lights are left burning is for the protection of the people of the municipality or community where danger is imminent. The right of such officers would not seem to be any the less in case of a false report of an emergency than in an actual emergency, because the authorities cannot wait until an enemy attack has been made before taking action to safeguard against the attack.

Therefore, in my opinion, air raid wardens, police officers and other like officers and agents should not force entrances to buildings for the purpose of turning out burning lights during a practice blackout, but in lieu thereof should report the owner or custodian of such buildings to

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the local defense council to be dealt with by them. In cases of blackouts due to an emergency, such as reports of enemy or unidentified planes approaching the municipality or populated communities, such buildings may be entered and the lights turned out; in which cases where it may be done, all such buildings should be entered by duly constituted police officers.

DEFENSE

May 18, 1942.—042-246.

CIVIL AUTHORITIES—ENFORCEMENT OF STATE DEFENSE COUNCIL RULES

QUESTION: (1) What is the power of civil authorities, under actual war conditions, to enforce rules and regulations for defense purposes promulgated by the State Defense Council?

(2) What is the power of civil authorities to enforce such rules and regulations in areas where the military authority of the United States has declared a military zone for defense purposes?

(3) What is the proper method for handling requests for cooperation, from federal departments and agencies, in connection with national and local defense?

To Hon. Spessard L. Holland, Governor:

Neither the drafters of the state and federal constitutions, the drafters of most of our statutory law, and writers of legal books of more than a decade ago, nor the writers of the vast majority of our court opinions ever envisioned modern warfare and its prosecution and effect against and upon civilians and non-combatants, for which reason we have but few legal precedents to guide us for the enforcement of defense activities which have now become of the greatest necessity and importance. In prior wars only the armed forces and those in the actual combat area were greatly endangered in life and limb, now the civilian population and non-military objectives, even hundreds of miles from the actual fighting, are in constant danger from the air and sea.

Because of these things the civil authorities are constantly confronted with new and unusual conditions in attempting to fulfill their new and war-time obligations to the civilian population and in their cooperation with civilian defense agencies, and this without benefit of legislation or past experience to guide them in most cases.

The State Defense Council is by law authorized to (1) *cooperate with federal departments and agencies*, and defense councils of other states, *engaged in defense activities*, (2) *require and direct the cooperation and assistance of state and local governmental agencies and officials*, (3) *utilize the services and facilities of state and local governmental agencies and officials*, and (4) *to do all acts and things, not inconsistent with law, for the furtherance of defense activities.*

Although the State Defense Council is given no executive officers and agents of its own to enforce its rules and regulations, it would seem to be a reasonable construction of the act to hold that the legislature contemplated that the reasonable rules and regulations of the council should be enforced by existing state and local governmental agencies and officials. The act being valid, and rules and regulations promulgated thereunder being valid under its provisions, it would seem to come within the purview of Section 6, Article IV of the Florida Constitution.

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which provides that "the Governor shall take care that the laws of the state are faithfully executed." It is the duty of the sheriff and other local police officers to take care that the laws of the state are faithfully executed in their locality. The enforcement of rules and regulations lawfully promulgated pursuant to a valid statute or law would seem to be an execution of a law of the state.

Acts injuriously affecting the public safety, health or comfort and the administration of the government are punishable as crimes at common law. In addition to specific crimes, the common law is sufficiently broad to punish as misdemeanors acts which directly injure or tend to injure the public to such an extent as to require the state to interfere and punish the wrong doer. (22 C. J. S. 67, Sec. 18; *La Tour vs. Stone*, 139 Fla. 681, 190 So. 704, text 708.) I am of the opinion that any interference with an officer in the enforcement of proper rules and regulations promulgated by the State Defense Council, or a refusal to obey such rules and regulations, would constitute a common law crime and subject the person interfering or refusing to obey to prosecution and punishment for a common law misdemeanor.

It is my understanding that one of the commanding officers of the armed forces of the United States has established a military zone along the eastern seaboard of the United States, including the State of Florida, for the purpose of controlling certain dangerous lighting and other conditions within that area. It is my further understanding that such military authority has made no attempt to enforce martial law within said area and is depending upon the civil authorities to enforce rules and regulations deemed necessary for civilian and military defense. In my opinion the establishment of military zones does not place the area under martial law, except insofar as the military authority may have taken over enforcement as to any matters. I see no reason why the civil authorities may not cooperate with the military authorities to the extent requested by them. This would seem to be within the purview of the Florida Defense Council Act, which has set up machinery for such cooperation.

The members of the State Defense Council receive no compensation for their services, except actual and necessary expenses, for which reason it is obvious that the body functions, as doubtless it was contemplated it should, more as a deliberative body in making general rules and regulations, than as an executive body. The Council, being authorized to cooperate with federal departments and agencies, would seem to be the proper body to make effective any rules and regulations desired by the military authority or other departments or agencies of the federal government. The proper method of making effective such request for cooperation would be for the governor, members or officers of the State Defense Council or any other persons receiving such request for cooperation, to transmit the same to the State Defense Council for action, which should consider the request and, if found to be proper, pass an order or resolution adopting the same and providing for its enforcement. When adopted as rules and regulations, by the council, the same should be forthwith transmitted to the proper authorities within the state for its enforcement with necessary directions for enforcement. When transmitted to such authorities they should proceed at once to enforce the same and upon their failure to promptly and properly do so the governor should direct its enforcement and, if necessary, may provide persons, even to the calling out of state military organizations, for its proper enforcement.

From what has been said I am of the opinion that:

(1) The state and county authorities, under actual war conditions, have the same power and authority to enforce rules and regulations pro-

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mulgated by the State Defense Council for defense purposes as they have to enforce other valid laws and rules and regulations promulgated pursuant to law.

(2) The state and county authorities, where the military authority of the United States has declared a military zone for any purpose, have the same power and authority to enforce rules and regulations promulgated by the State Defense Council for defense purposes within said zone as they had prior to such establishment of the military zone, except insofar as the military authorities have elected to exercise active authority contrary to such rules and regulations. The two may work together insofar as there is no actual conflict.

(3) Where any request for the adoption and enforcement of any rule or regulation is received from any agency or department of the federal government, by the governor, the council or any other person, the same should be forthwith transmitted to the State Defense Council for action and if found proper the council should pass an order or resolution providing for its adoption and enforcement.

(4) When any rule or regulation of the State Defense Council has been adopted and transmitted to the proper authorities for enforcement, if they neglect or refuse to properly enforce the same the governor should direct its enforcement, even to the extent of calling out sufficient of the military forces of the state for that purpose.

(5) The State Defense Council should adopt a uniform method and channel for the transmittal of rules and regulations, and instructions for their enforcement, to the authorities to be charged with enforcement.

(6) Where any rule or regulation of the State Defense Council and that of any regional county or local council conflicts, the rule or regulation of the State Defense Council should control.

DEFENSE

February 13, 1942.—042-82.

CIVILIAN ORGANIZATIONS—AIR RAID AND BLACKOUT RULES

QUESTION: With reference to the enforcement of rules and regulations set up for blackouts, air raids, and the matter of penalties for violation of such rules and regulations, what is the authority of persons officially engaged in civilian defense work who might or might not be deputized to enforce protective measures relating to defense of civilian population?

To Hon. Spessard L. Holland, Governor:

In considering the question, I assume you mean civilians either employed or appointed by a local defense council or the State Defense Council, or otherwise engaged in civilian defense work, and my opinion is so limited.

Chapter 20213, Acts of 1941, which establishes the State and County Defense Councils, contains no penal provision for violation of rules or regulations adopted pursuant thereto, and there are no general laws relating to the violation of rules and regulations. Neither does said act contain any provision giving police powers to persons certified by any defense council.

I am of the opinion that the framers of the Federal and State Constitutions, when they provided for the militia and for the keeping and

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bearing of arms, intended to provide a plan, co-extensive with changing times, for the protection of the citizens against attacks from without and from within.

The Governor as Chief Executive of the State is charged with directing this protection. As such he may call upon all able-bodied males between 18 and 45. He also may employ such persons as he deems necessary to the protection of life, liberty and property (Section 104, C. G. L.). This statute neither expressly requires that such employees be paid a salary by the State, nor prohibits the employment of persons connected with other departments of the State or its agencies. I see no reason why persons in the employment of or certified by defense councils cannot be employed by the Chief Executive for this purpose.

Under recent air raid ordinances particularly, and by general rules of law, the executive officer of a city or town is responsible for the safety of its inhabitants and property. The sheriff likewise is responsible for life and property within a county. The Governor, as we have noted, has a state-wide responsibility and authority.

Where the municipal authorities have not established adequate protective measures to meet the war-time emergency, and in areas outside municipalities, the sheriff should designate citizens of his county to enforce all defense rules and regulations authorized or approved by the State Defense Council and adopted by the local county council. The citizens designated by the sheriff need not be deputized, as they constitute the old common law sheriff's posse. He has ample precedent for calling out citizens of the county for defense work, but his activity should not duplicate that of municipal authorities where the latter is adequate to meet the emergency.

Where the sheriff fails or refuses to enforce such defense rules and regulations, then it becomes the duty of the Governor to call out or employ such persons as he may deem necessary for the protection of life and property within the county. Such persons when called out by the Governor have police powers commensurate with the duties required of them.

Adoption of rules and regulations for air raids and blackouts and similar protective measures has become a necessity, under modern conditions of warfare, for the protection of life and property, especially in thickly populated areas. Ignoring or violating proper rules and regulations tends to affect the public safety and may result in injury to inhabitants of the affected area to such an extent as to constitute a crime under the common law in force in this State.

Therefore, it follows that persons enlisted as auxiliary defense police by municipalities, or designated and authorized by a sheriff or Governor for defense duties, have authority to arrest violators of proper rules and regulations properly adopted by defense councils for the protection of life and property.

The authority of such persons to enter upon private property and to force entrances when necessary to extinguish lights visible from the sky and which might tend to give direction to air-borne enemies also follows as a matter of necessity, and such persons would not be guilty of trespass by breaking and entering. The authority to enter upon private property, however, does not constitute a license to do more than to extinguish the lights and to protect the property after it has been broken into.

I am further of the opinion that the Governor has authority under Section 104, Compiled General Laws of Florida, to employ persons to

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take specific defense measures to protect life and property in any part of the State where he deems it necessary, even in addition to measures taken by local authorities. This would seem especially true in connection with protection of public utilities and other industries covering more than one county.

I did not understand from your letter that you wanted a discussion of the separate functions of fire wardens, and the destruction of property as an incident to fire control under bomb attack, and have not included such.

DEFENSE

June 1, 1942.—042-273.

**COUNTY COMMISSIONERS—APPROPRIATION OF FUNDS TO
COUNTY DEFENSE COUNCIL**

QUESTION: County Commissioners of Santa Rosa County have adopted a resolution purporting to authorize the Board to appropriate \$2,500 from the general fund or such other fund as may be available, to be used by the Santa Rosa Defense Council as a loan to the Santa Rosa Barge Building Association, presumably a private corporation, for the purpose of locating a barge building plant at Milton, Florida. Does the county defense council have a right to enter into such an agreement, and does the county have the authority to lend such funds?

To Hon. George L. Burr, Jr., Executive Director, Florida State Defense Council:

Such an appropriation of funds by the Santa Rosa County Board of Commissioners for the purpose of financing or lending credit to the Santa Rosa Barge Building Association is in conflict with Section 10 of Article IX of the Constitution of Florida, which reads in part:

"The legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual."

As I see it, such an appropriation by the Santa Rosa County Commission would be contrary to the letter and purpose of Section 10 of Article IX of our Constitution and, therefore, a contract or agreement by the Santa Rosa County Defense Council predicated upon such an unconstitutional allocation of funds would not be authorized by the legislative authority under which the Council operates. See *City of Fernandina vs. State*, 190 So. 454.

DEFENSE

May 28, 1942.—042-269.

**DEFENSE PROGRAM—METHOD FOR COUNTIES TO PROVIDE
FUNDS**

QUESTION: What is the proper method for counties to provide funds for rapidly expanding civilian defense programs, where the amount budgeted by the county for defense purposes for the current fiscal year has proved inadequate?

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To Hon. George L. Burr, Jr., Executive Director, Florida State Defense Council:

Although Chapter 20673, Laws of Florida, Acts of 1941, authorizes county commissioners by resolution to provide for the expenditure of county funds for defense purposes, it does not dispense with the necessity of budgeting funds for that purpose. No expenditures may be made in the absence of budgeted funds for such expenditures. If no provision was made in the budget for the current fiscal year for defense purposes the county commissioners have no power by resolution to now make provision for such purpose. I presume that most if not all counties made some provision in their current budgets for defense purposes, although many of them proved to be inadequate.

Although not within the purview of the request I deem it proper that I call your attention to the fact that county budgets for the ensuing fiscal year will be made up and approved within the next few weeks and that you should make an effort in every county to procure adequate budgets for the fiscal year beginning October first next.

Amounts budgeted for defense or other purposes have the force and effect of a fixed appropriation and cannot be altered, amended or exceeded, nor may expenses for defense purposes be paid out of funds budgeted for other purposes (Sec. 2306 C. G. L.), except as otherwise provided by Section 2304, Compiled General Laws, 1927, and Section 2, Chapter 20673, Laws of Florida, Acts of 1941, which provide that the county commissioners may, under certain conditions, make transfer from one fund to another with the approval of the state comptroller, and of the county budget board in counties having such boards.

Under the above statutes if a surplus occurs in any fund, over and above the amount budgeted, the same may be considered as having the same status as the reserve for "contingencies and emergencies" and should be used in the same way (1931-1932 Reports, page 308). If after the budget is adopted the county commissioners find that, due to some emergency or contingency, they have failed to appropriate sufficient funds for a particular purpose, further expenditures for such purposes may be made from the reserve fund for "contingencies and emergencies" and if more than necessary has been appropriated to any fund transfers from such fund to another may be made, with the approval of the state comptroller and the county budget board if any (Section 2304, C. G. L.; Section 2, Chapter 20673, Acts of 1941; 1931-1932 Reports, page 308; 1933-1934 Reports, page 201). Transfers of funds must be by resolution of the county commissioners (Section 2304, C. G. L.; Section 2, Chapter 20673, Acts 1941).

DEFENSE

May 15, 1942.—042-239.

HIGHWAYS—POWER OF GOVERNOR TO CLOSE

QUESTION: Has the Governor of Florida authority to order the closing of certain state highways along the east coast of Florida from one half hour past legal time for sunset until one half hour before legal time for sunrise as a protective measure?

To Hon. Spessard L. Holland, Governor:

The adoption of a resolution providing for the closing of these highways, as well as other like roads, is within the powers and duties of the State Defense Council. Section 4 of Chapter 20213, Acts of 1941, authorized the State Defense Council to cooperate with federal agencies and departments engaged in defense activities and gave it power to require and direct the cooperation and assistance of state and local governmental agencies and officers and "to do all acts and things, not inconsistent with

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law, for the furtherance of defense activities." The closing of highways, when necessary as a defense activity for the protection of boats or vessels using the waters along or near the shores where such highways are located, seems to be a defense activity within the purview of the above statute.

Under our state constitution, the supreme executive powers of the state are vested in the governor, who is charged with the faithful execution of the laws of the state, (Sections 4 and 6, Article IV). Under our statutes the governor may employ as many persons as he may deem necessary for the protection of the life, liberty and property of the state and its inhabitants, (Section 105, Compiled General Laws). Chapter 20213, Acts of 1941, providing for the State Defense Council, seems to be a law designed to aid the federal government in national defense, (see 67 C. J. 372, Section 61) and, therefore, one the governor is charged with the execution of under our constitution.

Therefore, the proper procedure for closing these highways would be for the State Defense Council to pass a resolution showing the necessity for the closing of such highways, or reciting a request from a federal department or agency engaged in defense activities, and directing that said highway be closed during that period of each day necessary for such purpose. This resolution should be directed to the state or local governmental agency or official having the care, custody and control of the highway to be closed who should comply with such resolution by closing the highway. The state highways, which include federal aid highways, are under the care, custody and control of the state road department and are policed by the state road patrol in most instances. County and district roads are usually under the control of the county commissioners of the county wherein the roads are located and are policed by the sheriff's office in many cases.

The State Defense Council Act, Chapter 20213, supra, provides as follows (Section 5):

"In order to avoid duplication of services . . . the council . . . are

"(a) directed to utilize the services . . . of existing officers . . . of the political subdivision thereof, and

"(b) All such . . . agencies shall cooperate with and extend their services and facilities to the council . . . as they shall request."

Under these provisions it would seem in order for the resolutions aforesaid to be sent to the state road department in the case of state and federal roads and the particular county commissioners in the case of county and district roads and by these state agencies converted into formal road closing notices which road closing notices should recite that they are prepared and issued by authority of State Defense Council order and resolution, in each respective case to be signed by the state or county agency issuing the notice and posted on the barricades used to close the highways. Copies of these notices should be sent by the state road department in the one instance and the county commissioners in the other to the sheriffs in the counties where the road involved lies and to the director of the state road patrol with instructions that the closing of the roads set out in the notices be enforced by these state police agencies.

In view of the somewhat joint control of state and federal highways exercised by both the state road department and the county commissioners it would seem that the county commissioners should be always notified of the closing of any federal or state roads in their counties.

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If the officer or agency having the care, custody and control of the highway or road to be closed refuses and neglects to close the same then the governor may direct its closing and if necessary may employ persons as provided in Section 105, Compiled General Laws, to enforce such closing.

DEFENSE

March 13, 1942.—042-128.

MUNICIPALITY—LIABILITY FOR INJURIES TO AUXILIARY FIREMEN AND POLICEMEN

QUESTION: (1) Is a municipality liable under the Workmen's Compensation Act for injuries to special policemen or auxiliary firemen injured on duty during an air raid, blackout or other emergency?

(2) Would the municipality be liable in damages if such policemen or firemen suffered injuries during an emergency?

(3) Would the municipality be liable for injuries to third parties or their property as a result of the activities of such policemen or firemen?

To Hon. George L. Burr, Jr., Executive Director, Florida State Defense Council:

If the special policemen or firemen received no monetary compensation, the municipality would not be liable for their injuries or death under the Florida Workmen's Compensation Act. They would come within the protection afforded by the Workmen's Compensation Act only while rendering service to the municipality as special municipal policemen or firemen under circumstances for which they would be entitled to receive payment from the municipality. Otherwise, they would not qualify as an employee under sub-section 2 of section 2 of the Workmen's Compensation Act as amended in 1941. Should such policemen and firemen be compensated for their services, even though the employment is casual, they would qualify as employees and during the time of such employment the municipality would be liable for their injuries or death under the Florida Workmen's Compensation Act.

If the auxiliary policemen and firemen were not employees but occupied the status of ordinary citizens designated to perform certain police or defense services, within the police powers of the municipality, and were injured in carrying out such assignment, they could not maintain civil actions for damages against the municipality for their own injuries. A municipality cannot be sued for its negligence in the performance of a strictly governmental duty. The police powers of municipalities, as expressed in the enactment and enforcement of laws and regulations, are strictly governmental powers as distinguished from proprietary powers, such as the operation of utility plants or the conduct of a hospital. It is my opinion that in necessary police or fire work, incident to the use of its police powers by a municipality, a person injured thereby cannot maintain a civil action for damages against the municipality. The Supreme Court of Florida has restricted this, however, by requiring that fire engines, for example, must not be operated in a negligent manner. The feeling of the court is that activities beyond the strict governmental responsibilities of a municipality may become the subject of civil suits for damages. However, auxiliary policemen and firemen injured in carrying out proper orders and regulations under the police powers of a municipality could not sue that municipality for injuries or death sustained thereby.

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Our courts hold that police officers appointed by a municipality are not its agents or servants in such a sense to render the municipality responsible for unlawful or negligent acts in the discharge of their duties as policemen. The same would apply to firemen. The municipality might be liable in damages for injuries to others resulting from their officers doing a lawful and authorized act in an unlawful and unauthorized manner. Thus, to avoid this danger, auxiliary policemen and firemen should be well coached in what their duties are and in how they are to do them. It may be lawful, for example, for auxiliary policemen to break into a store for the purpose of extinguishing a light during a blackout, but they would not be authorized to destroy a plateglass window to get in, when entrance might be made through a window or door of less value. Nor should they leave the store open and at the mercy of passers-by after entrance has been forced.

DEFENSE

February 13, 1942.—042-84.

**PUBLIC BUILDING PROTECTION—TRAINING OF NEGRO STUDENTS
BY WHITE INSTRUCTORS**

QUESTION: The State Defense Council is planning to sponsor at the A. & M. College for Negroes a three-weeks training course in public building protection for negroes throughout the State and no negro instructors are available for this instruction. Is it illegal for white instructors to train negro instructors or students in Florida?

To Hon. George L. Burr, Jr., Executive Director, Florida State Defense Council:

I do not understand that such a training course would come under the State system of public education as defined in Section 118 of Chapter 19355, Acts of 1939, as it would be neither a public school nor an educational service to improve, promote, and protect the adequacy of the State system of public education. The instruction seems to be under the direction of the State Defense Council and not the State School System.

A school is defined in Section 118 as "an organization of pupils for instructional purposes into classes or grades at any school center on an elementary, a high or secondary school, or other public school level approved by and under regulations of the State Board." Such a training course, therefore, would not come under the provisions of Section 5870, Revised General Statutes, 1920, which provides: "It shall be unlawful in this State for white teachers to teach negroes in negro schools, and for negro teachers to teach in white schools. Any person or persons violating the provisions of this section shall be punished by a fine not to exceed five hundred dollars, or by imprisonment in the county jail not exceeding six months." (Ch. 6490, Acts 1913, §§1, 2, consolidated.)

I find no other reference in the Florida School Laws that would prohibit white instructors training negro instructors in defense work and conducting a course at the A. & M. College.

DEFENSE

January 10, 1942.—042-6.

NATIONAL GUARD OFFICERS—RETIRED—CALL TO ACTIVE DUTY

QUESTION: Has the Governor of Florida authority to call to active duty a retired National Guard Officer and place him in any active status with the State Defense Council?

MILITARY AND RELATED MATTERS—Defense

To Hon. Spessard L. Holland, Governor:

The laws of Florida give you no authority to call to active duty a retired National Guard Officer and place him in any active status with the State Defense Council.

If there are any retired National Guard officers who have expressed a willingness to be assigned to active duty in connection with the State Defense Council, I will be glad to answer any question concerning them.

DEFENSE

February 10, 1941.—041-56.

SELECTEES—VIOLATION OF STATE CRIMINAL LAWS

QUESTION: Are selectees in military service subject to state courts for violation of state criminal laws?

To Hon. Julian C. Calhoun, Assistant State Attorney, Palatka, Florida:

The law on this question 10 U.S.C.A., Section 1546, provides as follows:

"Delivery of offenders to civil authorities (Article LXXIV). When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

"When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence."

This statute has not been repealed or amended in any way so far as I can tell, and is doubtless applicable to men who have been conscripted under the Selective Training and Service Act of 1940. There is nothing in the latter Act which would lead to any conclusion other than that the selectees may be turned over to the civil authorities in times of peace, just as any other men in military service.

An excellent discussion of this situation is found in 6 CORPUS JURIS SECUNDUM, Army and Navy, Section 38, which reads as follows:

"Offenses by Persons in Military or Naval Service.

"Persons in the military or naval service may be guilty of criminal acts for which they may be prosecuted in civil or military courts.

"The fact that one is in the military service cannot exempt him from crime, and persons in the military service may be guilty of offenses

MILITARY AND RELATED MATTERS—Defense

against state laws as well as against military law. Various provisions of the fifty-fourth through the ninety-sixth articles of war enumerate, and prescribe punishment for offenses, some of which are peculiarly military offenses, while others may be punishable as offenses against either military law or civil law.

"In time of peace a person in the military service who, in any portion of a state or territory not within the exclusive jurisdiction of the United States, commits a criminal offense recognized and made punishable by the local laws is amenable to the state or territorial courts therefor. While there is no federal statute expressly conferring such jurisdiction, it is clearly recognized by the seventy-fourth Article of War (10 U.S.C.A. §1546), providing for the delivery of such offenders to the civil authorities when they are charged with offenses which are punishable by the laws of the land. If military authorities have any right to try members of the military for violation of state or municipal law, it must be under federal law, and, if there is any such law, it is paramount. The provision against trial for murder or rape by courts-martial in time of peace does not apply to a murder before peace in the legal sense; but, where the homicide was without the territory of the United States, accused may be tried by court-martial, even though no state of war exists. The liability to trial by a court-martial does not, it was held, exempt accused from being tried in the civil courts for violation of the civil law.

"In time of war all offenses committed by soldiers are cognizable by courts-martial or military commissions, and, if the civil courts in time of war try and punish such offenders, it is because they are permitted to do so as a matter of comity or expediency. However, military courts do not have exclusive jurisdiction, even in time of war, over offenses against state laws by persons in the military service. The articles of war do not deprive the civil courts, either in time of peace or war, of the concurrent jurisdiction previously vested in them over crimes against either federal or state laws, committed within the geographical limits of the United States and the District of Columbia by persons subject to military law, but in time of war the military authorities have the preference in the exercise of jurisdiction, and, if this preference is to be waived in favor of a civil court, the waiver must be by proper authority.

"Where both the civil and military courts have jurisdiction, the offender should be tried in the former in preference to the latter, under certain conditions and limitations, and it is the duty of the military authorities, under the seventy-fourth article, to deliver him to the civil magistrate on the application of the party injured; but, if no such application is made, the military courts should then proceed to exercise their jurisdiction. Where the military authorities have assumed jurisdiction of a case cognizable by the military tribunals, the civil courts will not interfere to try the offender pending the proceedings before the military authorities.

"*When not in actual military service* and within the military jurisdiction, as when on a furlough, a soldier may be arrested by the civil authorities for a criminal offense without the assistance of the military authorities."

In the Manual of Law for use by Advisory Boards for Registrants appointed pursuant to the Selective Training and Service Act of 1940, which Manual is compiled by the Committee on National Defense of the American Bar Association, the following is said on page 24 in connection with crimes committed by men in military service:

MILITARY AND RELATED MATTERS—Defense

"Military service does not relieve from criminal accountability. In time of war the civil authorities are perhaps not ousted of jurisdiction but the military authorities have priority in trying and punishing members of the military forces. In time of peace the practice may vary."

DEFENSE

January 20, 1942.—042-35.

SHERIFF—USE OF ARMED POSSE IN DEFENSE WORK

QUESTION: (1) Can a sheriff enlist assistance from the civil population, without deputizing the individuals?

(2) May such auxiliary police be armed?

(3) What is the responsibility of the sheriff toward such assistants?

To Mr. George L. Burr, Jr., *Executive Director, Florida State Defense Council:*

(1) The duties of the sheriff include the protection of the lives, persons, property, health and morals of the people of his county, to prevent breaches of the peace, to suppress riots and unlawful assemblies, and to act as conservator of the peace in his county.

By statute in Florida, it is "lawful for the sheriff to raise the power of the county and to command any persons to assist him, when necessary, in the execution of his office." At common law, which applies in Florida, the sheriff was required to defend the county against any common enemy, as well as to apprehend law-breakers. In that role, he was given the power to raise what we call a posse to suppress rebels, invaders or rioters. Every citizen capable of bearing arms was bound to yield obedience when called by the sheriff to assist him in the discharge of his duty, and that law remains in force in Florida today. When such assistance is called, the sheriff is the commanding officer.

(2) Such citizens when called to assist the sheriff were required to report armed. Translated into modern terms, the citizens called out by the sheriff today would be authorized to bear such arms as the situation justified, whether it be a machine gun to guard the capitol or a pistol to protect a beacon light.

(3) In answer to your third question, the sheriff is responsible for only such acts of his deputies as are performed within the scope of their authority. Other citizens called by the sheriff would be limited agents of his, for a *particular* purpose. The sheriff would not be liable for their acts performed under his lawful authority. If such assistants in helping him quell a riot should find it necessary to use force, they would not be breaking the law. The sheriff would be liable for their abuse of authority only if his assistants were carrying out a command of his which they knew to be illegal, as where the sheriff might call on them to assist him in stealing goods from a warehouse they were guarding. In such a case, both the official and his helpers would be liable.

DEFENSE

May 1, 1942.—042-210.

TRUCK OWNERS—LIABILITY IN DEFENSE WORK

QUESTION: What is the liability of owners and operators of motor trucks, loaned to and operated as a part of the truck subdivision of the

MILITARY AND RELATED MATTERS—Defense

Division of Transportation and Communications under the State Defense Council, for accidents and injuries due to the operation of said trucks?

To General Albert H. Blanding, Coordinating Director, Action Divisions, Florida State Defense Council, Tallahassee, Florida:

It is assumed that the motor trucks are being moved under and in accordance with orders or directions of the State Defense Council or some of its lawful agents when the accident or damage complained of occurs.

Except for liability under the Workmen's Compensation Act, neither the State nor the State Defense Council would seem to have any liability in connection with such accidents or injuries and the general rule would seem to be that where the owner or operator of the truck was operating the same in accordance with the instructions and directions of the State Defense Council there would be no liability to third parties for accidents or injuries occasioned by the operation of such vehicles, provided the owner or operator was not negligent in the operation thereof. If the owner or operator was negligent in the operation of the truck or was operating it contrary to the direction and instruction of the State Defense Council or its lawful agent, there would seem to be a personal liability on the part of such owner or operator for injury or accident occasioned by such operation.

Since the State Defense Council of Florida is a State Board, it would be liable under the Workmen's Compensation Act if it employs three or more employees and the person injured was one of its employees. Therefore, if an accident occurs due to the operation of a truck and the driver thereof is injured and is an employee of the State Defense Council, then such injured employee would be entitled to benefits under the Workmen's Compensation Act. This presupposes that the person injured is receiving some manner of compensation from the State Defense Council. If he is receiving no compensation, then I do not believe that he would be an employee within the purview of the Act.

On the other hand, if he was receiving compensation from his employer who had loaned him to the State Defense Council, I am of the opinion that his employer would be liable under the Workmen's Compensation Act.

DEFENSE

December 19, 1941.—041-683.

UNORGANIZED MILITIA—STATUS AND POWERS OF GOVERNOR

QUESTION: (1) What is the status of the unorganized militia of the State of Florida and what are the powers of the Governor regarding the unorganized militia?

(2) May male students be assigned to certain duties at the Florida State College for Women if under a war time emergency?

To Hon. Spessard L. Holland, Governor:

(1) The unorganized militia is composed of all "able bodied male inhabitants of the State between the ages of eighteen and forty-five years that are citizens of the United States or have declared their intention to become citizens thereof." (Florida Constitution, Article XIV, Section 1. Also Section 2015, Compiled General Laws.)

Chapter 20215, Acts of 1941, provides for the organization of the above mentioned group into the Florida Defense Force "to assist the

MILITARY AND RELATED MATTERS—Defense

civil authorities in maintaining law and order," under rules and regulations as to enlistment, organization, administration, equipment, maintenance, training and discipline, prescribed by the Governor in conformity, so far as practicable and desirable in the Governor's estimation, to existing law pertaining to the National Guard.

When this potential force is organized, it shall be under the supreme command, and subject to call in aid of the civil authorities, by the Governor, the Adjutant General or his Assistant, as was the case with the National Guard, and under like circumstances and for the same purpose.

The Governor is authorized to requisition, from the Secretary of War, for the use of the Florida Defense Force, such arms and equipment as may be available, and may make available the facilities of State Armories and their equipment and such other State premises and property as may be available.

The statute provides, among other things not necessary to mention here, that the appropriations for the Military Department—for the current biennium, the sum of \$141,940.00, including \$21,240.00 earmarked for purchase of land adjoining Camp Blanding, and \$2,000.00 for purchase of automotive equipment—shall be available for the purposes of the Act, to be paid out upon requisition of the Adjutant General, approved by the Governor.

In short, it seems that the Florida Defense Force is just another name for what used to be the State Militia, and later the National Guard. It is to be established, maintained and employed along virtually the same lines as the two earlier organizations, its membership to be made up of such male citizens as the Governor may determine should be enlisted therein and who may volunteer therefor.

As to the relationship of the Florida Defense Force and its functions with those of the State and Local Defense Councils, since the latter may be regarded as part of the civil authority of the State, I am of the view that the Florida Defense Force might, under proper rules and regulations, be made subject to such duty as State and Local Defense Councils might determine. Certainly the latter would be expected to act in an advisory capacity to those in command of the Florida Defense Force, the only military or quasi-military organization which, as I read the law, may now be established in the State of Florida.

(2) As to whether or not male students may attend Florida State College for Women, assuming that the word "attend" means "study, take courses, etc.," Section 804, Compiled General Laws, provides that "None but female white students shall be admitted to the Florida State College for Women." Ordinarily this would appear to preclude male students, though I am inclined to think that under wartime emergency conditions, when it is shown that the continual presence of men is essential to the protection of the Institution and its students, the State Board of Education and the State Board of Control would have authority jointly to allow a sufficient number of men to be present and assigned duties at the Institution, commensurate with and adequate for the demands of the time or period, although these men under the law would not, in my opinion, be entitled to become formally admitted as students of the Institution.

CHAPTER XIV

PUBLIC LANDS AND PROPERTY

INTERNAL IMPROVEMENT FUND

January 30, 1941.—041-21.

DEEDS—RESERVATION OF MINERALS

QUESTION: Section 1771, Compiled General Laws of Florida, 1927, relates to contracts for sale and deeds executed by the Trustees of the Internal Improvement Fund and State Board of Education reserving an undivided three-fourths interest in all phosphate minerals and metals in, on, or under the land. Is coral rock to be considered a mineral?

To Hon. Nathan Mayo, Commissioner of Agriculture:

In Webster's New International Dictionary, Second Edition, we find certain definitions of coral, as follows:

"The corals are mostly compound animals the individual polyps of which arise by budding; and the colony in many cases has a branching tree-like form."

"The polyps of corals are sometimes quite erroneously called insects, which they do not resemble. Except in their small size, and power of budding and secreting a hard skeleton, they resemble sea anemones."

"The skeletons of these small animals, solidified into a stony mass."

While coral rock may contain some mineral substance, sand and clay also contain some mineral. I do not think the statute contemplates coral rock being classified as a mineral any more than sand or clay.

Since phosphate is the only rock mentioned in the statute, it appears that by such omission the Legislature had no intention of including other forms of rock unless primarily minerals or metals in their formation.

Therefore, the above mentioned reservations required in deeds from the Trustees of the Internal Improvement Fund and State Board of Education do not include coral rock.

INTERNAL IMPROVEMENT FUND

February 12, 1942.—042-92.

EVERGLADES DRAINAGE DISTRICT TAXES—CANCELLATION

QUESTION: Does Section 17 of Chapter 20658, Acts of 1941 cancel the Everglades Drainage District taxes on lands owned by the Trustees of Internal Improvement Fund within the District, through the year 1941, or does the Act apply only to taxes through the year 1940?

To Hon. Nathan Mayo, Commissioner of Agriculture:

Section 17 of this Act is as follows:

"SECTION 17. All Everglades Drainage District special assessments and taxes whether or not evidenced by tax sale certificates, heretofore levied, assessed or entered with respect to lands now owned in fee simple by the Trustees of Internal Improvement Fund of the State of Florida

PUBLIC LANDS AND PROPERTY—Internal Improvement Fund

shall become cancelled and annulled upon the release, cancellation and surrender by such Trustees to the Board of Commissioners of all claims and demands, including Certificates of Indebtedness issued by said District pursuant to the provisions of said Chapter 14717, held by said Trustees against the District. The provisions of this Section shall not apply to the lands owned or claimed to be owned by the Trustees pursuant to the provisions of Everglades Drainage District laws enacted prior to the year 1931, or to the provisions of Chapter 18296, Laws of Florida, Acts of 1937."

This Section does not specifically state whether the taxes referred to are those for 1940 and prior years, or all taxes up to and including the date of the performance by the Trustees of the conditions as set forth in said Section. It appears, however, from a consideration of the entire Act that the intent of the Legislature was to revise the entire tax structure of the Everglades Drainage District and to encourage the redemption of forfeited lands within the District and the resumption of tax payments.

Section 15(a) of this Act purports to cancel all of the taxes of the District on all lands lying within its borders for the years 1937, 1938 and 1939.

Section 15(b) provides that the Clerks of the Circuit Courts of the counties lying within the District shall, upon application by any person, sell such person the tax sale certificate for District taxes upon any land which has been sold for taxes for the year 1936 or prior years, together with all prior and subsequent omitted or levied taxes up to and including those for the year 1940 upon the payment of certain sums of money which are set forth in a schedule.

Section 15(c) of the Act provides for the sale by the various Clerks of the Circuit Courts of the liens upon lands within the District for special assessments and taxes of the Drainage District for:

"all the years entered upon the tax rolls for the year 1940 and against which said lands there is no outstanding unredeemed tax sale or tax sale certificates"

upon the payment of certain amounts of money as set forth in a schedule.

It therefore appears that the Legislature intended to permit private owners of lands within the Everglades Drainage District to redeem their lands from all tax liens up to and including the taxes for the year 1940, upon the payment of the amounts set forth in the schedules contained in the Act.

There is nothing in the Act to indicate any legislative intent to include any later tax liens against lands of the Trustees of the Internal Improvement Fund than were included in the provisions relating to privately owned lands.

It is therefore my opinion, that Section 17, Chapter 20658, Laws of Florida, Acts of 1941, does not apply to Everglades Drainage District taxes for the year 1941 on lands in the District owned by the Trustees of the Internal Improvement Fund, but does apply to all district drainage taxes and special assessments against such lands up to and including those for the year 1940.

PUBLIC LANDS AND PROPERTY—Internal Improvement Fund**INTERNAL IMPROVEMENT FUND**

July 25, 1941.—041-400.

FUNDS—METHOD OF HANDLING

QUESTION: Should funds belonging to the Internal Improvement Fund of the State of Florida be handled as all other miscellaneous state funds; that is, daily receipts of such funds certified to the Comptroller, and disbursements of same made by Comptroller's warrants countersigned by the Governor?

To Hon. J. Edwin Larson, State Treasurer:

It is my opinion that, because of the provisions of Section 24, Article IV, of the Constitution of the State of Florida, all funds belonging to the Trustees of the Internal Improvement Fund should be handled as other miscellaneous State funds, and, therefore, can only be disbursed upon the order of the Comptroller countersigned by the Governor.

INTERNAL IMPROVEMENT FUND

February 6, 1942.—042-65.

LANDS—AUTHORITY TO SET ASIDE AND SPECIFY USE

QUESTION: Are the Trustees of the Internal Improvement Fund authorized to set aside 1040 acres of land in Levy County, Florida, for the use of the Game and Fresh Water Fish Commission for the propagation of fish and game?

To Hon. F. C. Elliot, Engineer and Secretary, Trustees Internal Improvement Fund:

The powers and duties of the Trustees with respect to lands acquired under this Act are set forth in Section 25 Chapter 14572 Laws of Fla. 1929, repealed by Chapter 17442, Laws of 1935 as follows:

"Section 25. (Section 1003-M.) The Trustees of the Internal Improvement Fund may hold and dispose of any such lands as provided by law with respect to other lands belonging to the Internal Improvement Fund. When any such land shall be sold the proceeds of sale shall first be applied to the payment into the State Treasury of the amount expended for costs, fees and expenses incurred in connection with any suit to foreclose the lien of any tax sale certificate upon such land, and the balance shall be paid into the general fund of the State and to the county in which the land lies in the proportions which represent the respective interests of the State and county in any such certificate and in the omitted subsequent taxes."

It therefore appears that the only authority the Trustees have is that provided by law with respect to other lands belonging to the Internal Improvement Fund. The Internal Improvement lands proper, which were acquired by the State of Florida under the Acts of Congress 1841, 1845 and 1850, were irrevocably vested in the Trustees by Chapter 610, Laws of Florida, Acts of 1855 (Section 1385, C. G. L. 1927), and the Trustees were by this Act given authority to hold and sell such lands and to invest the proceeds arising from such sales. I do not believe that this Act contemplated that the Trustees should divest themselves of control of and dominion over the trust lands, except by sale thereof.

Chapter 15642, Laws of Florida, Acts of 1931, gives the Trustees broad powers in the management of Internal Improvement lands and certain other lands belonging to the State of Florida. However, I do not

PUBLIC LANDS AND PROPERTY—Internal Improvement Fund

believe that this Act is broad enough to give the Trustees authority to set aside or dedicate lands for the exclusive use of another state agency.

It is therefore my opinion that the Trustees of the Internal Improvement Fund are not authorized under the law to set aside or dedicate the 1040 acres of land in Levy County for the use of the Game and Fresh Water Fish Commission.

INTERNAL IMPROVEMENT FUND

July 24, 1941.—041-392.

LANDS—CONVEYANCE WITHOUT CONSIDERATION

QUESTION: Under Chapter 21547, Acts of 1941, can the Trustees of the Internal Improvement Fund make conveyances of land without consideration?

To Hon. Nathan Mayo, Commissioner of Agriculture:

The Act in question purports to authorize the Trustees "in their discretion, to transfer and convey to the County of St. Lucie, Florida, upon such consideration and terms as they may deem proper, all or any part of sovereign, swamp and overflow, submerged or partly submerged lands in St. Lucie County, Florida, . . . to the County of St. Lucie, Florida, for public park purposes."

The Constitution of Florida provides:

"Twenty-five per cent of the sales of public lands which are now or may hereafter be owned by the State" constitutes a part of the State School Fund. Article XII, Section 4. It also provides that "the principal of the State School Fund shall remain sacred and inviolate." Article XII, Section 5.

The amendment to the Constitution adopted at the General Election, 1940, being Senate Joint Resolution No. 69 containing an amendment to Section 2 of Article IX of the Constitution of Florida, which abolishes ad valorem taxation for State purposes, except in certain described cases, seems to intend to preserve "State appropriations for the benefit of the uniform system of Florida public schools provided in accordance with Article XII of the Constitution." (1940 Amendment to Section 2 of Article IX of the Florida Constitution.) This same amendment just quoted repeals Section 6 of Article XII of the State Constitution, but this repeal does not affect the provisions of Sections 4 and 5 of Article XII as above quoted.

The Act inquired about (Chapter 21547, Laws of 1941) requires the Trustees in any case provided for thereunder, to make adequate provision for the protection of the interest of the State School Fund in any of said lands; unless the Trustees shall by proper resolution show and declare that in selling the lands without consideration, which this Act (Chapter 21547) purports to authorize, they are making adequate provision for the interests of the State School Fund therein, they would not be legally authorized to make a sale under said Act without a consideration.

To be a little more definite and practical, it seems to me that since these lands are State lands and the Constitution gives twenty-five per cent of their value to the State School Fund, they cannot be sold without consideration, but the Trustees must include as a consideration at least that which would be in their opinion twenty-five per cent of their fair value.

PUBLIC LANDS AND PROPERTY—Internal Improvement Fund**INTERNAL IMPROVEMENT FUND**

March 24, 1942.—042-138.

SOVEREIGNTY LANDS—SALE OF TIMBER

QUESTION: Are the Trustees of the Internal Improvement Fund of the State of Florida authorized to sell timber from Lake Miccosukee?

To Hon. Nathan Mayo, Commissioner of Agriculture:

You advise that the title to Lake Miccosukee passed to the State of Florida as an incident of sovereignty upon its admission into the Union on March 3, 1845.

This being true, the lands involved are what are commonly called "Sovereignty Lands" and the Trustees of the Internal Improvement Fund of The State of Florida are authorized to sell or lease timber growing thereon by the provisions of Section 1, Chapter 13670, Laws of Florida, Acts of 1929, which is as follows:

"Section 1. That the Trustees Internal Improvement Fund of the State of Florida be and they are hereby authorized to sell or lease any phosphate, earth or clay, sand, gravel, shell, mineral, metal, timber or water, or any other substance similar to the foregoing, in, on or under any of the sovereignty lands of the State of Florida, upon such terms and conditions as may seem most advisable to the said Trustees and to the best interest of the State of Florida, the proceeds of such sales or leases to be credited to the Trustees Internal Improvement Fund."

INTERNAL IMPROVEMENT FUND

May 19, 1942.—042-247.

TAX SALE CERTIFICATES—CANCELLATION

QUESTION: Certain lands in Plant City, Florida, were acquired by the City of Plant City in March, 1927, and were transferred by the city by deed in December of 1937 to the State Agricultural Marketing Board. At the time the State Agricultural Marketing Board acquired title by means of this deed, there were outstanding state and county tax certificates against the land for the years 1928, 1929, 1930 and 1933. Are the Trustees of the Internal Improvement Fund authorized to execute a Quit Claim Deed conveying their interest in said lands to the Agricultural Marketing Board?

To Hon. F. C. Elliot, Secretary, Trustees Internal Improvement Fund:

The Trustees of the Internal Improvement Fund have no interest in the land involved and no authority to convey the same, as title was vested in the State Agricultural Marketing Board in December 1937 and the State of Florida therefore acquired no title by operation of the Murphy Act (Chapter 18296, Acts of 1937), the title already being in a state agency on the date title would otherwise have reverted to the State under this Act.

Further all outstanding tax certificates against this land held by the State of Florida should be cancelled of record, as the liens for taxes evidenced by these certificates became extinguished by operation of law upon the vesting of title in the State Agricultural Marketing Board, a State Agency, in December 1937, by reason of the provisions of Section 1771 (8) and Section 1771 (9), Compiled General Laws of Florida, Permanent Supplement.

If any of the certificates are held by an individual, private firm, or corporation, they should be redeemed in accordance with law.

CHAPTER XV

PUBLIC BUSINESS

MISCELLANEOUS

October 8, 1941.—041-569.

AGRICULTURAL EXPERIMENT STATION—APPROPRIATION FOR LABORATORY

QUESTION: Propriety of using an appropriation under Chapter 20980, Acts of 1941 designated "Special—Vegetable Crops Laboratory Greenhouse, building for trailers, equipment for the biennium . . . \$10,000.00" for erection of laboratory, office space, barn or building for farm machinery, and a greenhouse.

To Hon. J. T. Diamond, Secretary, Board of Control:

Since office space is necessary in connection with the operation of a laboratory, since trailers constitute part of the farm machinery used in connection with the work of the Experiment Station, and since a greenhouse of the Experiment Station is actually a part of the laboratory facilities, it is my opinion that the brief terms of this particular appropriation are broad enough to cover the building of an additional laboratory and office space, a building for sheltering farm machinery, and a greenhouse at the Vegetable Crops Laboratory.

MISCELLANEOUS

August 28, 1941.—041-489.

FLORIDA CENTENNIAL COMMISSION—EXPENSES PRIOR TO CREATION

QUESTION: Should the Florida Centennial Commission be reimbursed for travel and other expenses incurred prior to its legal creation by enactment of Chapter 20864, Acts of 1941?

To Hon. J. M. Lee, State Comptroller:

In my opinion, you are not authorized to reimburse the Commission for any indebtedness incurred prior to the enactment of said law. My reasons for so ruling are:

(1) Section 7 of Chapter 20864 provides that the appropriation of \$36,000 is to be used by the Commission *in furthering the purposes of this Act*. I cannot conceive how there could be a furthering of the purposes of the Act before the Act had been duly enacted.

(2) Section 11, Article XVI, Constitution of Florida, provides: "... nor shall any money be appropriated or paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, unless such compensation or claim be allowed by bill passed by two thirds of the members elected to each House of the Legislature."

PUBLIC PRINTING

February 7, 1941.—041-46.

HOTEL COMMISSIONER—CONTRACTS LET BY PREDECESSOR

QUESTION: Can the Hotel Commissioner enter into negotiations with a printer relative to a contract for printing which was given to the

PUBLIC BUSINESS—Public Printing

printer by his predecessor, and could an action be maintained against his predecessor or his bonding company or the printer by reason of the fact that the files do not disclose that his predecessor procured competitive bids prior to awarding the printing contract and also because of the fact that the full cost of the printing has been paid although all of the printing of the supplies and the delivery thereof, has not been completed?

To Hon. Hunter G. Johnson, Hotel Commissioner:

I call your attention to Chapter 18064, Acts of 1937, being Section 1981, C. G. L., Perm. Supp., which provides for two classes of public printing. The printing for your department comes under the classification "B." The act further provides that printing of this class shall be let by the department to which it belongs but not under a general contract and only for the particular job of printing. Also that the job of printing be let to the lowest responsible printer manufacturing within the state and also that the respective departments shall call for bids from two or more printing houses within the state on each separate job of printing.

It is my opinion that you are authorized to enter into negotiations with the printer relative to the contract in question *provided the contract was valid in its inception*. You appreciate that I cannot determine the validity of the contract from the facts that I have at hand. In other words, I do not know whether or not your predecessor has or has not complied with the provisions of Section 1981, *supra*.

It is further my opinion that if your predecessor complied with the statutory requirements as aforesaid, the fact that he paid for the cost of the printing prior to the completion and delivery of the work, would not necessarily leave him or the bonding company liable.

STATE ARMORIES

July 29, 1942.—042-369.

WAR DAMAGE INSURANCE—PREMIUMS

QUESTION: Has the Budget Commission authority to allow the payment of premiums for war damage insurance on State Armories out of funds remaining from the purchase of 3,040 acres of land adjoining Camp Blanding, for which the Legislature of 1941 appropriated the sum of \$21,240 with which to buy the said lands?

To Hon. J. Edwin Larson, State Insurance Commissioner:

It appears from the correspondence accompanying your inquiry that after the purchase of the 3,040 acres of land there remained the sum of \$2,896.90 from the appropriation of \$21,240, and it is desired that a part of this surplus remaining be used for the purpose of coverage for war damage insurance of State Armories.

It is my opinion that this surplus remaining cannot be used for such purpose of purchasing war damage insurance on State Armories. I base my opinion for such holding upon the following reason. Chapter 282, Florida Statutes, under General and Miscellaneous Appropriations, Section 1, Item 16, Military Department of Florida, provides as follows:

Salaries	\$43,000
Necessary and Regular Expenses	75,700
Special expenses: One year only—for purchase of 3040 acres of land adjoining Camp Blanding	21,240

PUBLIC BUSINESS—State Armories

Chapter 282, Section 8, Florida Statutes, 1941, itemized the statement of expenses:

"In order to avail themselves of the appropriated items in this law, it shall be necessary at the usual time and in the usual manner, or when required by the budget commission, to present to the budget commission an itemized statement of their expenditures making up the total of the appropriations herein provided for, and for additional appropriations or less appropriations to make up such schedules as are necessary to advise the budget commission of the sum total of amount for salaries and for necessary and regular expenses to be included in appropriations allowed."

"Appropriation of money is the setting it apart officially, out of public revenue for special use or purpose, in such manner that executive officers of government will have authority to withdraw and use such money, and no more, for such object, and for no other." *State ex rel. Kurz vs. Lee*, Comptroller, 163 So. 859.

The Constitution of the State of Florida, Article IX, Section 4, provides:

"No money shall be drawn from the treasury except in pursuance of appropriations made by law."

"Appropriations may be made by setting apart and specially appropriating the money derived from a particular source of revenue to a particular use." *Lainhart vs. Catts*, 73 Fla. 735, 75 So. 47.

"The appropriation of money is the setting it apart formally or officially for a special use or purpose and where that is done by the Legislature in clear and unequivocal terms in a duly enacted law, it is an appropriation." *State vs. Allen*, 83 Fla. 214, 91 So. 104.

The object is to prevent the expenditure of the public funds without the consent of the people by their representatives in legislative acts and it secures for the Legislature the exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government.

STATE FIRE INSURANCE FUND

January 21, 1942.—042-37.

INSURANCE COMMISSIONER—INSTALLATION OF EQUIPMENT

QUESTION: Does the resolution passed by the Board of Control authorize the State Insurance Commissioner to advance money for the payment and installation of certain equipment and apparatus, as contemplated by Chapter 20311, Acts of 1941, assuming that the meeting of the Board of Control was duly and regularly held and that the resolution was duly enacted by said Board?

To Hon. J. Edwin Larson, State Insurance Commissioner:

In my opinion the resolution does not authorize you to advance money for the payment of the cost and installation of equipment and apparatus, as contemplated by Section 1 of Chapter 20311, *supra*.

My reason for so ruling is because the resolution is not an unqualified request as contemplated by Chapter 20311, *supra*. The resolution provides that it is to be *definitely understood* that the cost and installation of the equipment and apparatus is *not to be repaid* out of the General Revenue Fund. There is no other fund under existing law that can repay the State Fire Insurance Fund, except from the General

PUBLIC BUSINESS—State Fire Insurance Fund

Revenue Fund. The intent of Chapter 20311, supra, is that when the assets of the State Fire Insurance Fund exceed one million dollars that you, as State Treasurer, may upon request of the State Board of Education or the Board of Control or the Board of Commissioners of State Institutions, advance sufficient sums of money to install in certain buildings equipment, apparatus, facilities, and improvements that will reduce or eliminate fire hazards. The Act mandatorily provides that when these moneys are advanced from the State Fire Insurance Fund that same shall be repaid from the General Revenue Fund.

STATE FIRE INSURANCE FUND

October 9, 1942.—042-482.

INSURANCE COMMISSIONER—STATE PROPERTY

QUESTION: May property leased by a State department, which department is obligated to carry insurance thereon, be insured in the State Fire Insurance Fund for the protection of the owner of such property, and, if so, is the Insurance Commissioner authorized to certify to the interested parties that in the event of loss by fire such parties will be paid from the proceeds of such insurance out of the State Fire Insurance Fund as their interests may appear?

To Hon. J. Edwin Larson, State Insurance Commissioner:

Section 1, Chapter 20676, Laws of Florida, Acts of 1941 (Section 284.14, Florida Statutes 1941), specifically provides that, where the State of Florida, or any department thereof, holds a leasehold interest in any improved real property, and by the terms and provisions of said lease it is obligated to insure such premises against loss by fire, or by the terms and provisions of said lease it is obligated to withstand any loss occasioned by fire to such premises, said State or department shall insure such property in the State Fire Insurance Fund.

The purpose of the State Fire Insurance Fund, as created by statute, is to save the State and its various departments premiums on insurance on its own property or property upon which it is obligated to carry insurance.

The instruments attached to your request show that the City of Tallahassee, Florida, owned the Armory Building located in said city, and that the said City has contracted with the Board of County Commissioners of Leon County to sell said Armory Building to Leon County. In this contract of sale it is specifically provided that the County will at all times keep the said Armory Building insured against loss or damage by fire, in some substantial or reputable insurance company authorized to do business in the State of Florida, in a sum of not less than \$20,000, with loss payable to the City and County as their interests may appear.

It further appears from said documents that the County of Leon, after having entered into the aforesaid contract of sale, leased said Armory Building to the State Armory Board, and in said lease it is specifically provided that the said lessee shall keep the Armory Building insured so as to adequately protect the said County.

It is my opinion that the State Armory Board may fully comply with said requirements in this lease by insuring said property in the State Fire Insurance Fund.

In the resolution of the Board of County Commissioners of Leon County which was attached to your request, said County Commissioners,

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for and on behalf of Leon County, specifically authorize you, as State Treasurer and Custodian of the State Fire Insurance Fund, to pay to said City of Tallahassee, from the State Fire Insurance Fund, as its interest may appear, in the event said Armory Building is destroyed by fire.

In the event the State Armory Board insures said Armory Building in the State Fire Insurance Fund, you are authorized to pay from such funds the County of Leon and the City of Tallahassee, as their interests may appear, to the extent of the amount of insurance carried on said building in said State Fire Insurance Fund, and, having the authority to make such insurance payments, it is my opinion that you may properly certify to the City of Tallahassee as requested by the Board of County Commissioners of Leon County, Florida, that you will, upon proper proof of loss or damage to said Armory Building by fire, pay the City of Tallahassee from the proceeds of said insurance carried in the State Fire Insurance Fund, as its interest may appear, pursuant to the terms and conditions of the resolution, contract of sale, and lease hereinbefore referred to.

CHAPTER XVI

PENSIONS AND WAR VETERANS

CONFEDERATE PENSIONS

August 16, 1941.—041-456.

BOARD OF PENSIONS—DARWIN BRANCH GIVENS—LAW RETROACTIVE

QUESTION: May the State Board of Pensions properly pay a pension to Darwin Branch Givens under Chapter 19550, Acts of 1939, for that period of time from January 1, 1937, the date fixed in the Act for commencement of said pension to June 12, 1939, the date when said Act became a law?

To Board of Pensions:

In the case of State of Florida, ex rel., Darwin Branch Givens vs. Florida Board of Pensions, decided on June 3, 1941, the Supreme Court held that Chapter 19550, supra, "was regularly passed and was effective for the purposes for which it was intended."

Chapter 19550, supra, provides:

"That the State Board of Pensions is hereby authorized and directed to place the name of the said Darwin Branch Givens, of Tampa, Hillsborough County, Florida, on the Roll of Confederate Pensions as of January 1st, A.D. 1937, and that he be paid the same amount as other pensioners of the Southern Confederacy are paid."

The clear intent of this Act was to grant a Confederate pension to Darwin Branch Givens, said pension to be effective as of January 1, 1937. It was clearly intended by said legislature that the Act should be retroactive in effect.

There appears to be no limitation upon the legislative authority to enact such retrospective or retroactive legislation, unless of course such legislation violates other constitutional provisions such as due process of vested rights. Of course ex post facto laws are prohibited by our Constitution but our Supreme Court, in the case of Board of Commissioners vs. Forbes Pioneer Boat Line, 86 So. 201, said "that such prohibition is confined to laws respecting criminal punishment, and has no relation to retrospective legislation of any other character."

In view of the clear intent of Chapter 19550, supra, and the absence of any constitutional prohibition against the enactment of retrospective or retroactive legislation, and in view of the further fact that our Supreme Court has said that Chapter 19550, supra, was regularly passed and was effective for the purposes for which it was intended, it is my opinion that your Board may properly pay to Darwin Branch Givens his pension for that period of time from January 1, 1937, to June 12, 1939. The mere fact that Mr. Givens neglected to include that period of time in his petition for alternative writ of mandamus did not estop him from requesting the same at this time.

PENSIONS AND WAR VETERANS—Laws Relating to Veterans Generally
LAWS RELATING TO VETERANS, GENERALLY

August 22, 1941.—041-469.

DECEASED VETERAN—EDUCATIONAL ASSISTANCE FOR CHILDREN

QUESTION: To obtain educational assistance under Chapter 20966, Acts of 1941, must one of the applicant's parents have been a Florida resident at the time of entering military service?

To Hon. J. T. Diamond, Secretary, Board of Control:

Inasmuch as the Act provides that either parent of the applicant must have entered the military service of the United States "from the State of Florida," to qualify, an applicant must show that such parent was a legal resident of this State at the time of his enlistment, although not for any specified period.

CHAPTER XVII

DRAINAGE

GENERAL

November 19, 1942.—042-521.

DRAINAGE DISTRICT TAXPAYERS—DISCOUNTS

QUESTION: Are taxpayers in a Special Drainage District entitled to the discounts allowed by State law with reference to the payment of taxes in November, December, January and February?

To Hon. Randall Wells, Tax Collector, Putnam County, Palatka, Florida:

The section of the statute providing for discounts is Section 193.41, Florida Statutes 1941, the applicable part of which reads:

"On all taxes assessed on the county tax rolls and collected by the county tax collector, discounts for early payment thereof shall be at the rate of four per cent in the month of November, three per cent in the month of December, two per cent in the following month of January, and one per cent in the following month of February, the taxes being payable in March without discount."

It is my opinion that this statute should be so construed as to include drainage taxes. It seems to me that, regardless of the fact that this is in the nature of a yearly installment levy, such levy is padded to the extent of ten percent each year and, theoretically, the early taxpayer will get the advantage of the discount by the prompt payment of his taxes. That, of course, was the purpose behind the statute permitting discounts, and while I realize that the bonds must be paid in full, still, I think, the early taxpayer should be given some consideration in view of our statute, and I believe that as a practical matter it will probably work to that end by continuing to allow the discounts. I understand that it has been the universal practice of tax collectors to allow these discounts and I think that it would hardly be wise, at this late date, to change such practice.

GENERAL

June 29, 1942.—042-323.

EVERGLADES DRAINAGE DISTRICT—BONDS AND COUPONS— DELIVERY TO DISTRICT BY STATE TREASURER

QUESTION: Is the State Treasurer now authorized to comply with the provisions of the decree entered by the Honorable Paul D. Barns, Circuit Judge, on February 18, 1941, in that certain cause pending in the Circuit Court, in and for Dade County, Florida, wherein W. O. Lassiter is Plaintiff and the Board of Commissioners of Everglades Drainage District, is Defendant, directing him to transfer and deliver to Mr. K. M. Throop, as Treasurer of the Everglades Drainage District, certain money and certain coupons and bonds of the Everglades Drainage District?

To Hon. J. Edwin Larson, State Treasurer:

I have made an investigation into the status of this suit, as well as all other heretofore pending litigation in any way involving the Ever-

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glades Drainage District, and from such investigation it appears that all other suits involving the Everglades Drainage District have been dismissed, and that there are no outstanding or effective orders or decrees entered in any of these various suits which would prevent you from complying with this order.

The Trustees of the Internal Improvement Fund today adopted two resolutions authorizing and directing you, as State Treasurer, to transfer to the Treasurer of the Everglades Drainage District all bonds and coupons, as well as other evidences of indebtedness of the District which you hold for the account of the Trustees.

It is therefore my opinion that you should, at the earliest practicable date, comply with the provisions of the order entered by Judge Barns by delivering to the Treasurer of the Everglades Drainage District the money, bonds and coupons as therein directed.

You call my particular attention to the fact that you have in your possession, as State Treasurer, certain Everglades Drainage District bonds and coupons which this order directs the State Comptroller to deliver to the Treasurer of the Everglades Drainage District. These particular coupons and bonds should be jointly delivered to the Treasurer of the Everglades Drainage District by the State Comptroller and you as State Treasurer.

GENERAL

September 6, 1941.—041-506.

EVERGLADES DRAINAGE DISTRICT—MAINTENANCE TAX

QUESTION: (1) Does Section 8, Chapter 20658, Laws of 1941, require tax assessor of Everglades Drainage District counties to levy a one-half mill maintenance tax in their counties against district lands?

(2) Does Section 54 of Chapter 20722, or any other portion of this law, require a reduction of the one-half mill in proportion to the increase in values of Everglades Drainage District land?

To Hon. Spessard L. Holland, Governor:

Question (1) I answer yes.

Question (2) I answer no.

"The intention of the Legislature in enacting a law is the law itself and must be enforced when ascertained, and this intent must be found from a view of the whole law and a view of other laws in *pari materia*." *Curry vs. Lehman*, 47 So. 18.

I have been informed that at a conference held in your office between all of the members of the 1941 legislature from the counties affected by Chapter 20658, Acts of 1941, certain of these conferring legislators strenuously insisted that since the provisions of a proposed "Tax Assessing Law" (subsequently enacted as Chapter 20722, Laws of 1941) would require 100% valuation for levying purposes instead of the previous lesser valuations which their assessors had been using for levying purposes, that a then contemplated one mill levy against the Everglades Drainage District lands in their counties would have to be substituted by a lesser levy for this drainage district administration fund, or they would not support the proposed new tax law (Chapter 20722) and they insisted upon the reduction of the one mill to a one-half mill levy. My information goes further to the effect that this one-half mill levy was

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agreed upon in the light of this insistence and that the Everglades Drainage District Law in its Section 7 (Chapter 20658) was made to so read.

I am influenced and guided somewhat by the foregoing in reaching the conclusions here expressed with respect to legislative intent concerning the two inquiries above separated and numbered.

Chapter 20658, Laws of 1941, divides the Everglades Drainage District for tax assessing purposes into seven zones. A per acre assessment is fixed in the act by zones to provide the principal and interest for bonded debt service. (Section 2, Chapter 20658, *supra*.)

The Board of Commissioners of the Everglades Drainage District is required to prepare a budget showing *debt* service requirements of the district. (Section 3, Chapter 20658, *supra*.)

The same Board is required to adopt a resolution levying and imposing a *debt* service tax upon the lands of all seven district zones. (Section 3, sub-paragraph (e), Chapter 20658, Acts of 1941, *supra*.)

The levies so made by said Board in lists are to be certified by the Chairman of the Board of Commissioners of the Everglades Drainage District and attested by its Secretary under the seal of the district to the county assessors of each county in which the separate lands involved are located. These certified lists are required to direct the county assessor of taxes of the counties involved to make tax assessments to conform, but are only for debt service.

With respect to these assessments above discussed, no reduction of millage pursuant to the provisions of Chapter 20722 could be deemed applicable because primarily the millage reduction of Chapter 20722 is contingent upon a 100% valuation for assessment purposes, whereas the valuation for assessment purposes is fixed in this Chapter 20658 covering *debt service* taxation for the district involved, as being so much per acre, rather than so much millage on a fixed valuation.

Under the foregoing it is evident that the dollar of valuation for purposes of *Everglades Drainage District bond service tax* is the per acre assessment directed to be made.

The language in connection with the one-half mill *administration* assessment of Chapter 20658 with respect to valuation is as follows:

"An annual tax of one-half of one mill on each dollar of valuation for purposes of county taxation."

This clearly indicates that the one-half mill tax is assessable on a different valuation basis from the debt service Everglades tax aforesaid.

Section 2, Chapter 20722, Acts of 1941, requires the county assessor of taxes to assess all property at its full cash value. This, then, becomes the valuation for purposes of county taxation, that is to say, this requires "full cash value."

Section 54 of Chapter 20722, contemplates that the governing board or authority of all taxing districts *whose taxes are assessed on the tax rolls prepared by the county tax assessors* shall, for the years 1941-42 and 1942-43, reduce millages to be levied for those years from the millages levied for the fiscal year 1940-41, proportionately to the increase of the ratio of assessed value to the full cash value.

Reduction of millage contemplated in Section 54 is *tied to assessment rolls prepared on a basis of full cash value*, and to taxing authorities of taxing districts *"whose taxes are assessed on the tax rolls prepared by the*

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county assessor." The assessment in Section 7 of Chapter 20658, being the one-half mill administration tax for the Everglades Drainage District, is not upon a taxing district's property "whose taxes are assessed on the tax rolls prepared by the county assessor," but on the contrary the tax assessment of the district for administration purposes of a one-half mill is made in Section 7 of Chapter 20658 by the legislature itself, and there is no tax roll prepared by anybody constituting the basis of the record of this assessment.

I am of the opinion that the valuation fixed in 1941 and 1942 against Everglades Drainage District lands in the counties involved for county taxation is the valuation upon which the one-half mill administration tax imposed by Section 7 of Chapter 20658 is to be levied, and that such levy is a final legislative imposition, and under the language of the two acts hereinabove discussed, and the general intent and purview of that language, and those two acts, this one-half mill administration assessment for administration purposes is final and not subject to any reduction.

GENERAL

August 28, 1942.—042-428.

**SOUTH FLORIDA CONSERVANCY DRAINAGE DISTRICT—TAX
LIABILITY**

QUESTION: Is there any liability on the part of the Trustees of the Internal Improvement Fund to pay taxes levied by the South Florida Conservancy Drainage District on lands held by the State Board of Education as provided in Section 6, Chapter 20,477, Laws of Florida, 1941?

To Hon. Nathan Mayo, Commissioner of Agriculture:

This act provides that the lands used by the Everglades Agricultural Experiment Station, whether the title is held by the Trustees of the Internal Improvement Fund, the State Board of Education, or any other state agency, are subject to taxation by the South Florida Conservancy Drainage District and that "the Trustees of the Internal Improvement Fund are authorized and directed to pay out of any monies in their hands derived from the sale of lands, or otherwise, all South Florida Conservancy District taxes heretofore levied and assessed, or which may hereafter be levied and assessed, upon such lands." It seems clearly, therefore, to be the intention of the Legislature that the Trustees of the Internal Improvement Fund pay these taxes on the lands used by the Everglades Experiment Station even though the title to such lands be held by the State Board of Education, or some other state agency.

Accordingly, the Trustees of the Internal Improvement Fund are liable to pay taxes levied by the South Florida Conservancy District on lands used in connection with the Everglades Agricultural Experiment Station, even though the title to such lands be held by the State Board of Education, or some other state agency.

Your request does not require me to express an opinion as to the power of the Legislature to enact the above provision, but I shall examine this question if you wish to make further inquiry to that effect.

CHAPTER XVIII

MOTOR VEHICLES

TRAFFIC ON HIGHWAYS

August 20, 1941.—041-455.

ACCIDENTS—REPORTS—CONFIDENTIAL

QUESTION: Does Section 17 of Chapter 20578, Acts of 1941 mean that *all* reports of accidents shall be regarded as confidential?

To Hon. G. A. Worley, State Attorney, Miami, Florida:

It is my opinion that since the statute specifically says—"All accident reports made *by persons involved in accidents*" etc., it means just what such plain and unequivocal language imports and does not apply to any other reports.

TRAFFIC ON HIGHWAYS

March 19, 1941.—041-149.

DRIVING REGULATIONS—INTERSTATE CARRIERS

QUESTION: Must automobile drivers engaged in interstate commerce comply with Section 804 of Chapter 19355, Acts of 1939, prohibiting the passing of a school bus which is stopped on a highway of the state before first bringing the motor vehicle to a full stop?

To Hon. Paul Wongrey, County Prosecuting Attorney, Okeechobee:

If the defendant in question is merely a private operator of a motor vehicle, his contention is without merit, for, as the Florida Supreme Court said in *State vs. Mizell*, 128 Fla. 125, 174 So. 216:

"It is settled law that, in the exercise of its police power, if Congress has not pre-empted the field, a State may in the interest of public safety prescribe uniform regulations for the operation of automobiles on the public highways whether moving in interstate or intrastate commerce."

To the same effect, see the decision of the United States Supreme Court in *Buck vs. Kuykendall*, 267 U. S. 307, 69 L. Ed. 623.

Since Congress has not pre-empted the field of safety on highways as to private vehicles, and the Interstate Commerce Commission has been granted no power in respect thereto, the driver of a private motor vehicle in interstate commerce is unquestionably subject to the Florida statute relating to passing school busses.

If the defendant in question was operating a common carrier or contract carrier of passengers and property, or a private carrier of property, in interstate commerce, a very difficult question is raised, for such carriers in interstate commerce are under the jurisdiction of the Interstate Commerce Commission by virtue of the provisions of the Federal Motor Carrier Act.

A few months ago the Interstate Commerce Commission promulgated motor carrier safety regulations. Section 2.20 of these regulations provides:

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"SPECIAL CARE REQUIRED IN PASSING STOPPED BUSES.—No motor vehicle when meeting or overtaking any school or other bus discharging or taking on passengers shall be driven past such bus except with extreme caution and only if the course ahead is known to be clear."

In the recent case of *H. P. Welch Company vs. New Hampshire*, 306 U. S. 79, 83 L. Ed. 500, the United States Supreme Court specifically refrained from deciding whether certain regulations of the Interstate Commerce Commission under the Federal Motor Carrier Act superseded a State statute on the same subject relating to safety, and I have been able to find no case since that time which has passed upon this question. It is my view, however, that the regulation quoted above does not supersede and suspend the operation of the Florida statute relating to passing school busses.

It would certainly be a travesty on our system of government if the carriers on the highways, usually heavy loaded trucks, difficult to stop, were, because engaged in interstate commerce, allowed to pass stopped school busses without first coming to a stop, when all other vehicles would be required first to stop. Clearly, the State has the right to protect the lives of its citizens through this statute as to all vehicles, including carriers in interstate commerce. Only a clear and absolute conflict between this statute and the regulation can have the effect of superseding the Florida Act, and this clear conflict in my view does not exist here.

This conclusion is supported by Section 2.062 of the same regulations of the Interstate Commerce Commission, which reads:

"LEGAL LIMITS MUST BE OBSERVED.—In no event shall a motor vehicle be driven in or through any state, legal subdivision thereof, the District of Columbia, or any area under the control of the Federal Government at a speed greater than that permitted by such State, legal subdivision thereof, District of Columbia, or the Federal Government."

The Florida statute as to bringing a vehicle to a stop before passing a stopped school bus may properly be considered a statute regulating speed, and hence is expressly made applicable to interstate carriers.

It is my opinion, therefore, that the driver of a motor vehicle in interstate commerce on the highways of Florida must bring his vehicle to a full stop before passing a stopped school bus in accordance with the Florida statute, regardless of whether he is the operator of a private vehicle or a carrier subject to the regulations of the Interstate Commerce Commission.

TRAFFIC ON HIGHWAYS

April 1, 1942.—042-147.

SPEED RESTRICTIONS—GOVERNOR—AUTHORITY

QUESTION: Has the Governor of Florida power to regulate the speed of motor vehicles on the highways of Florida?

To Hon. Spessard L. Holland, Governor:

The latest and controlling legislative action in this connection is comprehended within the provisions of Chapter 20578, Acts of 1941, Section 22 of which prohibits the driving of a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. Under paragraph (b) of this same Section, the law contains a provision con-

MOTOR VEHICLES—Traffic on Highways

cerning "special hazards" that leaves a clear implication of an intention to recognize an authority for limitations of speed rates where special hazards exist. The statute contains no express rate of speed limitation beyond which the motor vehicle is prohibited in traveling, but does specify speed limits traveling in excess of which shall be prima facie evidence of reckless driving.

Section 24 of the same Act provides that the State Road Department may, regardless of such specified restrictions, "determine upon the basis of an engineering and traffic investigation that any speed . . . is greater or less than is reasonable or safe under the conditions found to exist at any intersection, or other place, or upon any part of a highway outside of municipalities." It also provides that said State Road Department "may determine and declare a reasonable and safe speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway."

The foregoing references embrace all existing statutory provisions regulating rates of speed for the driving of vehicles on our State highways. In the President's letter he states: ". . . waste could be curtailed to the advantage of . . . the country, if the speed of all motor vehicles were limited to a maximum of forty miles per hour and if regulations were promulgated requiring frequent checking of tires in order to insure their repair or, where possible, retreading at the proper time." "Reduction of speed limits and regular inspection of tires constitute another important means of Federal-State cooperation in the war effort."

Chapter 20578, Sections 67 and 68, prohibits the driving of a motor vehicle over the public highways, unless its equipment is in good working order and adjustment and is safe, so as not to endanger the driver or other occupant or any person upon the highways, and empowers the Director, members of the State Highway Patrol, and such other officers and employees of this Department as the Director may designate, to require the driver of a motor vehicle operating on the State's roads to stop and submit such vehicles to an inspection, and if it is found to be in an unsafe condition, or its parts or equipment to be unsafe, the officer may give a written notice to the driver thereof, requiring the vehicle to be placed in safe condition and its equipment in proper repair within a period of forty-eight hours.

Users of automobiles, operators of passenger busses, and traffic trucks in the State, are now by rationing regulations issued by the office of Production Management of the Federal Government, restricted in their purchase of tire equipment, which makes the purchase of the safest tire equipment for these vehicles and the possession and use of the best and safest type of tires by them at all times impossible, and by virtue of these rationing regulations, as time progresses, the supply of the best equipment in tires will necessarily diminish available for these users.

This situation has been brought about by virtue of a general rubber shortage, but it not only creates a shortage in the supply of tire facilities, but also makes the use of the motor vehicle and its operation on our State roads more hazardous and less safe than would be the case if the best tire equipment were available; and as time progresses and the weather becomes hotter, the hazard and unsafeness becomes greater, caused by the shortage of good tires and the use more and more of substitutes therefor.

The Governor of Florida has no common law powers to issue proclamations so as to carry with the proclamations the force and effect of law, but he does bear, as the Chief Executive of the State, the same

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relation to the State as the President of the United States bears to the United States, and as such Chief Executive he is charged with the authority and power of causing the laws of the State to be duly executed. He may issue proclamations when he thinks it proper to give notice or information to the public of legal requirements imposed by or under State law.

It seems to me that the tire rationing regulations above referred to in their operation and effect do produce special hazards in the running of motor vehicles using tires, which use these regulations now control, because the regulations enforced necessarily result in the use of poorer tire equipment by the motor vehicles affected. Retreaded tires, patched and vulcanized carcasses, become more dangerous in their use as the weather gets hotter, and of course second-hand and used tires cannot be regarded as being as safe as a new one.

I am of the opinion that this situation would warrant an engineering and traffic investigation by the State Road Department of the gravity of such additional hazard, inquiring into whether or not any specified maximum speed limit should be enforced in the State on any of its highways outside of municipalities, in order to safeguard the public against such hazards, and protect the users of motor vehicles under the existence thereof; and upon such investigation to determine and declare a reasonable and safe maximum speed limit for motor vehicles so affected on our State roads. Whatever this Department determines, consequent upon such an investigation, could be by proclamation of you as Governor made known to the people of the State.

The provisions of Section 24 of the Chapter aforesaid state that the determination of the State Road Department, arrived at under such an investigation, of the reasonable and safe speed limit decided to be imposed, "shall be effective when appropriate signs giving notice thereof are erected at such . . . other place or part of the highway." I therefore think that the determined speed rate should be posted by such signs in occasional places along the highways where the speed limit declared is to become effective as a part of the necessary prerequisites to the legal enforcement of such speed regulation.

Upon all of the foregoing as a premise, it is my opinion that you may properly refer the President's letter, and, if desired, this opinion, to the State Road Department for appropriate action by it under the law referred to herein, touching the subject matter involved, and thereafter make such proclamation covering the Department's action as may be pertinent and necessary to give adequate public notice thereof.

TRAFFIC ON HIGHWAYS

June 22, 1942.—042-312.

SPEED RESTRICTIONS—TRUCKS

QUESTION: Has the State Director of the Office of Price Administration authority to regulate the speed of trucks?

To Hon. W. C. Sherman, State Director, Office of Price Administration, Jacksonville, Florida:

I refer you to Article I, subsection (f) of Section 1, Chapter 20578, Laws of Florida, 1941, which defines a truck as follows:

"TRUCK. Every motor vehicle designed, used or maintained primarily for the transportation of property.

"Article VI, Section 22. SPEED RESTRICTIONS.

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"(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

"(c) Every motor vehicle of a gross weight in excess of 8,000 pounds, unless equipped with pneumatic tires and designed for carrying passengers, shall observe the following speed limits in addition to the basic rule as set forth in subsection (a) of this section:

- "1. Twenty-five miles per hour in business or residence district.
- "2. Fifty miles per hour in other locations during the daytime.
- "3. Forty-five miles per hour in such other locations during nighttime.

"For the purposes of this subsection, any speed in excess of the above shall be considered prima facie evidence of reckless driving.

"Article VI, Section 24. ESTABLISHMENT OF STATE SPEED ZONES. Whenever the State Road Department shall determine upon the basis of an engineering and traffic investigation that any speed hereinbefore set forth is greater or less than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a highway outside of municipalities, said State Road Department may determine and declare a reasonable and safe speed limit thereat which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway."

To assist you in arriving at your goal of saving and preserving tires, I would suggest that you seek the cooperation of the State Road Department under Section 24 above.

MOTOR VEHICLE COMMISSIONER

May 22, 1942.—042-255.

AUTOMOBILE DEALERS—RECORDS—EXAMINATION

QUESTION: Can the Motor Vehicle Commissioner legally examine the records kept by car dealers for the purpose of determining whether or not the dealers are engaging in Taxi Cab, U-Drive-It, or any For Hire business without first securing the proper license?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

You are not authorized under the law to conduct an examination of the books or records of automobile dealers for the purpose of determining whether they are conducting a Taxi Cab, U-Drive-It or For Hire business, without having first secured the proper license, unless permission is first given by the dealer whose books and records are to be examined.

MOTOR VEHICLE COMMISSIONER

March 29, 1941.—041-173.

SAFETY MAGAZINE—UNDERWRITING PARTIAL COST

QUESTION: Does the Motor Vehicle Commissioner have the authority to make an expenditure of funds not to exceed \$1,000 to pay

MOTOR VEHICLES—Motor Vehicle Commissioner

the initial cost of a publication to be issued monthly in collaboration with the Department of Public Safety and the State Road Department, when within approximately three months the magazine should be conducted on a self-sustaining basis, the advertising procured being sufficient to cover the cost of its publication?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

I have made a close examination of the law to determine whether you would have authority to join in such a publication. The only authority I can find does not permit such participation, but is restrictive as to publicizing certain information of your Department. This right is conferred in the following laws:

Chapter 9157, Acts of 1923, known as the Auto Theft Act, provides in Section 10 as follows:

"The Motor Vehicle Commissioner shall publish once a month a list of all motor vehicles stolen or recovered during the previous month and forward a copy of the same to every Sheriff, and all Police Departments in cities with ten thousand inhabitants."

Chapter 19479, Laws of 1939, which conferred authority upon you to consummate reciprocal agreements with other States, provides in Section 3 as follows:

"The said Motor Vehicle Commissioner, the State Road Department and said Railroad Commission shall give proper publicity to the terms of every such reciprocal agreement entered into by them, or either of them."

Your letter states that there may be authority granted you, pursuant to Section 1285 Compiled General Laws of Florida, paragraph 14 Permanent Supplement. Chapter 19551, Acts of 1939 creates the Department of Public Safety of the State of Florida. Section 14, covering Administration, pursuant to the terms of this law, provides as follows:

"ADMINISTRATION.—The Department of Public Safety and its executive board which are otherwise created by this Act are hereby charged with the administrative function of enforcing the provisions of this Article. In addition to his duties now provided by law, the Motor Vehicle Commissioner of this State shall be, and he is hereby charged with the duty of serving as the Executive Officer of said Department of Public Safety insofar as the administration of this Article is concerned. He shall be subject to the supervision and direction of the Executive Board of said Department of Public Safety, but his official actions and decisions as such Executive Officer shall be conclusive unless the same are superseded or reversed by said Executive Board, or by a court of competent jurisdiction. The Executive Board shall make and adopt rules and regulations for the orderly administration of this Article."

This section charges you with the duty of serving as the Executive Officer of the Department of Public Safety insofar as its administration is concerned. While the Act in general provides for the licensing of chauffeurs and other operators of motor vehicles, provides penalties and punishment for such operation, etc., it does not confer upon you, as Motor Vehicle Commissioner, any authority to join in a publication of a monthly magazine. Your duties as an Executive Officer of the Department of Public Safety, cover your field of operation as such an officer, and not as Commissioner of Motor Vehicles.

There is no provision in our laws for publishing weight regulations. Opinions of the Attorney General, decisions of the Supreme Court and

MOTOR VEHICLES—Motor Vehicle Commissioner

legislative changes of the motor vehicle law are publicized by these Departments of our State Government.

I regret to advise that in my opinion you are not authorized, under the present law, to contract for the expenditure of a sum of money up to \$1,000.00, to collaborate in financing the initial cost of a publication to be used jointly by the Department of Public Safety, the State Road Department and the Motor Vehicle Department.

TITLE CERTIFICATES

July 11, 1941.—041-376.

APPLICATIONS—ISSUANCE

QUESTION: Is it required that a motor vehicle owner either purchase or have had issued to him a license tag, before the Motor Vehicle Commissioner would be authorized to issue a title certificate for such motor vehicle?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Chapter 3978, Compiled General Laws of Florida for 1927 provides that the owner of every motor vehicle in this State shall make application to the motor vehicle commissioner for a certificate of title for such motor vehicle upon an application furnished by the Motor Vehicle Commissioner which contains a full description of the motor vehicle and such information as the Motor Vehicle Commissioner may require. The commissioner, if satisfied that the applicant is the owner of the motor vehicle and entitled to have the same registered in his name, shall thereupon issue to the applicant an appropriate certificate of title. The charge of each certificate of title shall be \$1.00.

Under the provisions of this statute it appears that upon presentation of an application duly and properly completed and accompanied by a fee of \$1.00, you would be required to issue a certificate of title. Nowhere in the Florida title certificate law of which the above mentioned section of our statute is a part does it appear that as a condition precedent to the issuance of a title certificate the motor vehicle owner is required to purchase a license tag. While in practically all cases the motor vehicle owner will purchase a license tag, there may be circumstances under which a title certificate will be desired without the necessity of the purchasing of a license tag, such as in cases where the motor vehicle is not operated or maintained in Florida. If it should appear upon the request of any motor vehicle owner that the motor vehicle is being operated or maintained in Florida, which appears to be the situation referred to in your request for an opinion, then, while you can not refuse to issue a title certificate, you would be authorized to insist upon the immediate purchase of a license tag pursuant to the provisions of Section 1281, Compiled General Laws of Florida for 1927.

Therefore you would not be authorized to refuse to issue a title certificate upon the presentation of a proper application for such a certificate even though the motor vehicle owner has not purchased or had issued for such a motor vehicle a license plate.

TITLE CERTIFICATES

August 7, 1942.—042-384.

COURT PROCEEDINGS—ISSUANCE SUSPENDED

QUESTION: Is the party instituting a replevin action entitled to a certificate of title on repossession affidavit for the automobile involved in said replevin action?

MOTOR VEHICLES—Title Certificates

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

The copies of pleadings attached to your request indicate that the replevin action is still pending and undisposed of. Issue has been joined on the plaintiff's claim of ownership and the right of possession. These questions have not as yet been determined by the court which has acquired jurisdiction of the controversy.

While the statute gives you the power and authority to issue title certificates on motor vehicles when satisfied that the applicant is the owner of such vehicle or otherwise entitled to have the same registered in his name, nevertheless it is my opinion that whenever a court of competent jurisdiction has entertained a proceeding of this kind, no new title certificate should be issued by you on the particular motor vehicle involved in the pending action until the court has determined the questions of ownership and right of possession.

TITLE CERTIFICATES

April 22, 1941.—041-216.

DEALERS—SALES

QUESTION: The Motor Vehicle Commissioner advises that he is frequently requested by automobile dealers to issue original certificates of title from the manufacturers to themselves, for new cars on display or in storage at their places of business. This request is made so that a larger volume of title registrations will appear on dealer's reports to district agencies; that at a later date he is often presented with another application for original title from the manufacturer to the purchaser of the new car from the dealer, and when he advises the dealer that the title is vested in him, he represents that the first original application was made in error and that the previous certificate of title should be cancelled. Should the Motor Vehicle Commissioner permit the motor vehicle dealers to constantly indulge in such a practice?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 7 of Chapter 9157, Laws of Florida, Acts of 1923, provides in part as follows:

"In the case of dealers in motor vehicles, . . . who sell to others than dealers, . . . a separate certificate of title, either of such dealer's immediate vendor, or of the dealer himself, shall be required in the case of each motor vehicle in his possession, and the Motor Vehicle Commissioner shall determine the form in which application for such certificates of title and assignments thereof shall be made; provided, however, that no such certificate shall be required in the case of new motor vehicles sold by manufacturers to dealers . . ."

Automobile dealers are permitted, pursuant to law, to secure a transfer of title from the manufacturer to the purchaser without taking title in their name. However, if they choose to transfer title to themselves, then they would have to transfer the title from themselves to the purchaser. From the numerous requests made by the dealers for cancellation, it appears that it is not actually a mistake on their part, but that they are making the request for new certificates of title in order to make their record of sales for some period of time of a much more impressive nature. The law does not contemplate that the dealers may impose upon the office of the Motor Vehicle Commissioner. The law only contemplates a transfer from the manufacturer to the dealer or from the manufacturer to the purchaser.

MOTOR VEHICLES—Title Certificates

Therefore if the dealers secure title in their own name, then they would have to transfer the title of the motor vehicle from themselves to the purchaser.

TITLE CERTIFICATES

March 24, 1941.—041-146.

ITINERANT VENDORS—SALES

QUESTION: May a non-resident sell a motor vehicle to an individual or dealer in this State, without first securing Title Certificate in his name, under the provisions of Section 2, Chapter 18032, Laws of 1937?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Chapter 18032, Laws of 1937, was an Act to regulate the business of selling used or second-hand motor vehicles by dealers not residing in or having a permanent place of business in the State of Florida, and by resident dealers purchasing, handling, or selling used or second-hand motor vehicles received or acquired from non-residents. This Act was made necessary because non-resident dealers in used motor vehicles have frequently caused to be transported large numbers of used or second-hand motor vehicles into the State of Florida, for sale or for re-sale, either directly to the public or through local agents or dealers in motor vehicles, and in the sale of motor vehicles, have made fraudulent representations or warranties as to such motor vehicles, and the purchaser of same was without recourse except in the courts of the domicile of the seller.

Section 2 of said Act is as follows:

"Every person, firm or corporation upon the sale and delivery of any used, or second hand, motor vehicle shall within 24 hours thereof deliver to the vendee, and endorsed according to law, a Certificate of Title, issued for said vehicle by the State Motor Vehicle Commissioner of Florida."

The question to be determined, in ascertaining the non-resident referred to in Section 2, is the meaning of the words "every person, firm or corporation."

This law was passed to regulate the business of selling used cars by non-residents or itinerant vendors, and, therefore, concerns itself only with such individuals, partnerships, corporations or trusts whose business, in whole or in part, is that of selling used motor vehicles, and would, of necessity, include every agent, representative, or consignee of any such vendors. This Act would not apply to an individual not engaged, in whole or in part, in the sale of motor vehicles, but who, of necessity, has to dispose of his personal motor vehicle while he is within the State of Florida. Each case will have to be determined separately upon its own facts. The foregoing analysis may be applied as a criterion to determine such application.

It is my opinion that the person, firm or corporation used in Section 2 of Chapter 18032, Laws of 1937, refers to a non-resident or itinerant vendor who is engaged, in part or in whole, in the sale of motor vehicles within the State of Florida.

MOTOR VEHICLES—Title Certificates**TITLE CERTIFICATES**

December 7, 1942.—042-560.

JOINT OWNERS—TRANSFER

QUESTION: Must all owners named in title certificate execute certificate to entitle transfer by assignment?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Sections 319.02 and 319.03, Florida Statutes 1941, provide for issuance of "certificates of title" for motor vehicles and transfer thereof.

Reading these two sections together means that the owner, or someone having authority for him, has the authority to transfer the certificate by endorsement. When the certificate is signed by the person or all persons shown as owner on the face of the certificate, the Commissioner may make transfer without difficulty. Questions of authority to execute immediately arise on presentation of certificates for transfer by assignment not executed by all owners named in certificate.

A motor vehicle is personal property subject to same general laws relating to transfer, except as to registration and transfer of title, as other personal property. Statutes requiring "title certificates" put the purchaser on notice as to real owner and transfers by assignment of such property of record should not be authorized on execution of less than all persons named in certificate without additional authorization showing authority to execute. The Commissioner by virtue of authority in sections mentioned heretofore "must be satisfied" that applicant is true owner. It is not unreasonable to require signature of all or additional evidence showing authority to sign.

The fact that the words "and", "or" or "and/or" are used to join the holders of the title does not affect the power of the Commissioner to require such endorsement.

In case the certificate is held in the name of husband and wife an estate by the entireties is created (Section 689.15 Florida Statutes 1941), American Insurance Company vs. Whitlock, 165 So. 380, and the right of survivorship exists; however there can be no right of survivorship in others unless expressly provided. Our Florida Courts have held that the husband may dispose of property held by entireties without joinder of the wife. (See Merrill vs. Adkins, 180 So. 41, and Mann vs. Etchells, 182 So. 198) In case of divorce there would be no survivorship or right to dispose of property of ex-wife without her joinder. Consequently it would be dangerous to allow transfer by husband alone even when held by the entireties, without some authority other than face of the certificate itself. I might observe here that an estate by entireties in personal property gives the wife no authority to convey such property without joinder of the husband.

The fact that a motor vehicle is registered by several as tenants in common in itself, gives no right for one to assign without joinder of others (14 American Jurisprudence, Co-tenancy No. 85). The intention of the parties must be determined. I do not believe it may be determined from the face of the certificate alone.

In view of the primary purpose of the laws requiring title certificates: (1) to determine liability in case of accident, and (2) for protection against theft; it is my opinion that certificates should be signed by all persons whose names appear thereon as owners when application is made for transfer by assignment by owner, unless some valid authority is shown for one to execute for all.

MOTOR VEHICLES—Title Certificates
TITLE CERTIFICATES

August 25, 1941.—041-481.

LIENS—RECORDATION—TRAILERS

QUESTION: Under Chapter 20917, Acts of 1941, should notices of liens on trailers and semi-trailers be filed and recorded in the office of the State Motor Vehicle Commissioner?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 1 of Chapter 20917, Laws of Florida, Acts of 1941, requiring the filing of notices of liens in your office as a condition precedent to their enforcement applies to "motor vehicles as now or may be hereafter defined by law."

The laws of this state now define motor vehicles as "all motorcycles, automobiles, motor trucks, and all other vehicles operated over the public streets and highways of this State and propelled by power other than muscular power, except traction engines, road rollers and such vehicles as run only upon a track."

"Trailers" are defined by our law as "all four wheel vehicles coupled to or drawn by a motor vehicle."

"Semi-trailers" are defined as "all two wheel vehicles coupled to or drawn by any motor vehicle."

Chapter 20917, *supra*, requires that the notice of such liens shall contain, among other things, the motor number of the particular motor vehicle involved. Trailers and semi-trailers of course have neither motors nor motor numbers.

In view of the foregoing definitions, and in view of the constant distinction in the Motor Vehicle Law between motor vehicles, trailers and semi-trailers, it is my opinion that trailers and semi-trailers do not come under the provisions of Chapter 20917, Acts of 1941. However, if you desire, and are requested so to do, I know of no reason why you may not accept for filing and recording notices of liens covering trailers and semi-trailers.

TITLE CERTIFICATES

July 8, 1941.—041-369.

LIENS AND SATISFACTIONS—RECORDATION

QUESTION: Is it required that liens or encumbrances on motor vehicles be shown on the title certificates after August 1, 1941 when Chapter 20225, Laws of Florida, Acts of 1941 takes effect?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Please be advised that Chapter 20225, Laws of Florida, Acts of 1941, provides for the recording in your office of a sworn notice of all liens for purchase money or as security for debts on motor vehicles. Section 1 of said law in part provides that such filing is in lieu of all filing and recording now required or authorized by law and shall be effective as constructive notice when filed. Section 6 of said law repeals all laws or parts of laws in conflict therewith.

It is my opinion that from and after August 1, 1941, when this law takes effect it will be unnecessary for you to have as a part of the title certificates the list of liens or encumbrances covering the motor vehicle.

MOTOR VEHICLES—Title Certificates

The filing pursuant to the provisions of Chapter 20225, Laws of Florida, Acts of 1941 in your office is all that is required.

TITLE CERTIFICATES

July 31, 1941.—041-419.

LIENS AND SATISFACTIONS—REGULATIONS

QUESTION: Individuals and corporations have been writing the Motor Vehicle Commissioner requesting that he mail them daily a list of liens and satisfactions recorded in his office pursuant to the provisions of Chapter 20917, Laws of Florida, Acts of 1941. Would the Commissioner be permitted to make a service charge for mailing a daily list of such liens and satisfactions in view of the fact that a compliance with such request makes it necessary for him to secure additional clerks or assistants and increases the cost of stationery, postage, etc.?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

In view of Section 3 of said law which allows you to make such rules and regulations as you deem necessary and proper for the effective administration of this law, I am of the opinion that you would be authorized to make a service charge for mailing such list of liens and satisfactions. You should endeavor to make these charges reasonable and commensurate with the expenses involved.

TITLE CERTIFICATES

September 9, 1941.—041-511.

REGISTERED OWNER—DEFINITION

QUESTION: The owner trades an automobile, which is properly registered in his name, to a dealer who later resells it to a new purchaser who has not registered his ownership with the Motor Vehicle Commissioner. Under the provisions of Section 1, Chapter 20225, Acts of 1941, who is to be considered the "registered owner"?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Generally speaking, "registered owner" means owner of record: Under the provisions of Section 1281, Compiled General Laws of Florida, 1927, every owner of a motor vehicle is required to register the same in the office of the Motor Vehicle Commissioner.

Therefore, "registered owner" as appearing in Section 1 of Chapter 20225, Laws of Florida, Acts of 1941, means the owner of an automobile as recorded in the official records of the Motor Vehicle Commission. The "registered owner" is the person shown by these records to be the owner at any given time.

However, as a practical matter, I think lien holders desiring to record a notice of lien under the provisions of this Act should require new purchasers to register ownership either prior to, or simultaneously with, the filing of such notice of lien, so that the "registered owner" in every case would be in fact the actual owner at the time of the filing of the notice of lien.

MOTOR VEHICLES—Title Certificates**TITLE CERTIFICATES**

March 24, 1941.—041-147.

RESIDENT DEALERS—DESCRIPTIVE AFFIDAVITS

QUESTION: If a non-resident trades a motor vehicle to a resident dealer, should the Motor Vehicle Commissioner require the dealer, in making application for Florida Title Certificate, to complete an affidavit stating both the description of the vehicle taken in trade and the description of the vehicle sold to the out-of-State resident?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Pursuant to Chapter 11901, Acts of 1927, which created your office and prescribed your duties and powers, you were vested with full authority, on behalf of the State of Florida, to administer and carry out all laws relating to registration and re-registration of motor vehicles, the issuance and cancellation of title certificates, and in general all duties devolving upon you under existing provisions of law, whether then existing or subsequently passed. If, in the proper administration of the motor vehicle law, it is necessary for you to have such information in order to more efficiently perform the duties of your office, then it would be within your province to require such information.

In my opinion there is no prohibition, under existing laws, precluding your requiring an affidavit from a resident dealer, stating the description of the motor vehicle taken in trade and the description of the motor vehicle sold to a non-resident.

TITLE CERTIFICATES

April 24, 1941.—041-222.

TITLE—TRANSFER BY MORTGAGOR

QUESTION: Has the Motor Vehicle Commissioner authority to transfer title certificate to a motor vehicle in the possession of the mortgagee by voluntary surrender and delivery of a waiver of certain terms and conditions of the mortgage?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

The waiver and consent for sale executed by the mortgagor, so far as notice of sale is concerned, is without any proper premise in the original mortgage, since that instrument contains no reference to notice. However, since, under the law, a mortgage constitutes a mere lien and is not effective to transfer title, the waiver should be construed as requiring of the mortgagee compliance with the provisions in the mortgage and the waiver with reference to a sale, either public or private, and an accounting to the mortgagor of the proceeds of the sale. All that the waiver undertakes to do is to dispense with notice of sale. The transaction otherwise is controlled by the terms and conditions of the mortgage.

You will note that the holder of the mortgage is given the right to bid at any "public sale," thereby by inference, depriving the mortgagee of the right to purchase at private sale, or to take title in any other way than by a bona fide sale in compliance with the conditions of the mortgage.

My conclusion, therefore, is that the circumstances of this case are not such as to justify you in transferring title certificate to Florida

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MOTOR VEHICLES—Title Certificates

Power Credit Union, but that you would be authorized to issue such certificate to a purchaser at any sale by the mortgagee and the filing with you of the necessary documents evidencing such sale.

LICENSES

September 4, 1942.—042-436.

BOND—TAX COLLECTORS AS LICENSE PLATE AGENTS

QUESTION: What are the requirements of bonds of tax collectors acting as license plate agents?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

The bonds required of tax collectors acting as license plate agents, under the statute should be in favor of the Motor Vehicle Commissioner and his successors in office, in an amount to be determined by the Motor Vehicle Commissioner, and conditioned upon the tax collector faithfully and truly performing the duties imposed upon him according to the requirements of law and the rules and regulations of the State Motor Vehicle Commissioner, and upon paying and accounting for all license plates, records and other property and money which may come into his possession or control by reason of the performance of such duties.

The bond required of one appointed as acting tax collector should be in a sum not to exceed one-half the amount of the bond prescribed for the tax collector whose duties he is performing.

LICENSES

April 4, 1942.—042-157.

CORPORATIONS—SALES—TAX LIABILITY

QUESTION: Are the DeSoto Motor Corporation, Plymouth Motor Corporation and Chrysler Sales Corporation subject to the license provisions of Chapter 20236, Acts of 1941?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

It is first necessary to determine whether these corporations are manufacturers, factory branches or factory representatives within the meaning of Chapter 20236, Laws of Florida, Acts of 1941.

Section 1 of this Act defines "Manufacturer," "Factory branch" and "Factory representative" as follows:

"'Manufacturer' means any person, resident or non-resident in this state, who manufactures or assembles motor vehicles and includes in the case of a corporation or co-partnership its central or principal sales corporation or other agency through which it distributes its products."

"'Factory branch' means a branch office maintained by a manufacturer for the sale of motor vehicles to distributors, or for the sale of motor vehicles to motor vehicle dealers or for directing or supervising in whole or part, its representatives in this state."

"'Factory representative' means a representative employed by a manufacturer or by a factory branch, for the purpose of making or promoting the sale of its motor vehicles, or for supervising or contacting its dealers or prospective dealers."

MOTOR VEHICLES—Licenses

Section 2 of this Act provides that:

"No manufacturer, factory branch or factory representative shall engage in business as such in this state without a license therefor as provided in this act."

It appears from the correspondence submitted with your letter that these corporations are wholly owned subsidiaries of Chrysler Corporation; that Chrysler Corporation manufactures DeSoto, Plymouth and Chrysler automobiles and sells them to dealers in Florida for resale; that DeSoto Motor Corporation, Plymouth Motor Corporation and Chrysler Sales Corporation do not manufacture automobiles, but each is an independent contractor engaged in the business of promoting the sale of automobiles for Chrysler Corporation, the manufacturer. None of them is classifiable as an agency through which the manufacturer distributes its products.

From a careful study of Chapter 20236, Laws of Florida, Acts of 1941, it is apparent that the licensing part of this Act was intended to require manufacturers, factory branches and factory representatives, as these are defined in the Act, to obtain licenses before engaging in business in this State.

DeSoto Motor Corporation, Plymouth Motor Corporation and Chrysler Sales Corporation are not classifiable as being either a manufacturer, a factory branch or factory representative, as these are defined in the Act. Their activities are confined to general sales promotional work, such as advising with dealers and arranging for the display of new model automobiles.

Therefore DeSoto Motor Corporation, Plymouth Motor Corporation and Chrysler Sales Corporation are not subject to the license provisions of Chapter 20236, Laws of Florida, Acts of 1941.

LICENSES

April 22, 1941.—041-215.

DEALERS—RECORDS—AUTHORITY

QUESTION: Is the Motor Vehicle Commissioner authorized under existing law to require motor vehicle dealers to notify him of any sale of a motor vehicle, upon a form delivered by him to the dealers, entitled "Notice of Sale" and containing a request for information as follows:

- (1) Make and type of vehicle,
- (2) Engine and serial number,
- (3) Name and address of purchaser,
- (4) Date of sale,
- (5) Amount of lien,
- (6) Title certificate,
- (7) License plate number?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 11, Chapter 9157, Laws of Florida, Acts of 1923, provides in part as follows:

"... it shall be unlawful for any person to carry on or conduct in this State the business of buying, selling or dealing in used vehicles,

MOTOR VEHICLES—Licenses

unless and until he shall have received a license from the Motor Vehicle Commissioner authorizing the carrying on or conducting of such business: . . . Every such licensee shall keep a book or record in such form as may be prescribed or approved by the Motor Vehicle Commissioner in which he shall keep a record of the purchase, sale or exchange or receipt for the purpose of sale, of any second-hand vehicle, a description of such vehicle, together with the name and address of the seller, or the purchaser, and of the alleged owner or other person from whom such vehicle was purchased or received, or to whom it was sold or delivered, as the case may be. Such description shall also include the engine number, if any, the maker's number, if any, chassis number, if any, and such other numbers or identification marks as may be thereon . . ."

As the Motor Vehicle Commissioner has the authority to prescribe the form of record to be maintained by the dealers, then you would be authorized, if you determine that it is necessary and advisable in the proper administration of your Department, to have the dealers return a completed Notice of Sale containing the information in response to the questions stated hereinabove.

LICENSES

August 8, 1942.—042-386.

ENLISTED MEN—TEMPORARILY STATIONED IN FLORIDA

QUESTION: Are men sent into Florida by the War Department in connection with the Army Air Force at Large, required to obtain current Florida license tags for their motor vehicles when such men are transferred here from some other state and are never in this state permanently, but are shifted from place to place from time to time by the War Department?

To Hon. Angier Wills, Chief, Civilian Police Supervisor, Drew Field, Sub Depot, Tampa, Florida:

Where a nonresident owner of a motor vehicle temporarily in Florida has complied with the motor vehicle license laws of his home state, he is not required to obtain a Florida license plate for his motor vehicle unless he accepts employment or engages in some trade, profession or occupation in this state, or enters his children to be educated in the public schools of Florida, in either of which events he is required to register his motor vehicle in this state if he proposes to operate the same on the highways of Florida.

Your letter does not clearly set forth whether the men to whom you refer are enlisted men in the armed service of the United States, or whether they are civilian employees, defense workers, or civil service employees assigned to some branch of the armed forces in this state.

Members of the armed forces are not required to procure Florida license plates until the license plates on their motor vehicles from their home state have expired. However, civil service employees, civilian employees and defense workers transferred to Florida, or accepting employment in this state, are required to procure a Florida license tag if they propose to operate their motor vehicles on the highways of this state.

MOTOR VEHICLES—Licenses**LICENSES**

December 3, 1941.—041-668.

FEES—ISSUANCE ON TENDER OF CORRECT TAX

QUESTION: Approximately 12,000 motor vehicle license tags for 1941 were sold for \$10.00 each, when the proper fee should have been \$15.00. With the exception of about 800, all of these 12,000 automobile owners have exchanged their license tags and paid the additional \$5.00 fee. Does the Motor Vehicle Commissioner have authority to refuse to issue license tags to these 800 owners until they have paid the additional \$5.00 back tax for their 1941 tags?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 1285 Compiled General Laws of Florida, 1927, is in part as follows:

"(2) The registration tax required under this Chapter when not paid, shall constitute a first lien upon the motor vehicles against which the same is chargeable, which lien shall be superior to all other liens upon such motor vehicle, and may be enforced and collected if delinquent more than thirty days by levy and sale in the same manner as under an execution of law on the amount of the tax due, which enforcement may be under a tax warrant issued for that purpose by the State motor vehicle commissioner and enforced in like manner as is provided by law for the enforcement of tax warrants by the Comptroller under section 1273."

Your remedy is to issue tax warrants for the amount of the back license taxes on these particular automobiles. Further you would not be justified in refusing to register and issue a license tag for 1942 for these automobiles upon proper application being made to you and a tender of the proper fees.

LICENSES

April 8, 1941.—041-184.

FOREIGN REPRESENTATIVES—EXEMPTIONS

QUESTION: It has been the practice of the Motor Vehicle Department to issue exempt auto licenses to all bona fide representatives of foreign governments who might be stationed within the State of Florida; the Commissioner desires to continue this courtesy, but complaints have come to his department to the effect that licenses were being used by persons representing themselves as "vice" or "honorary" consul who are engaged in other gainful businesses in the State of Florida than that of the foreign government they represent. Should the courtesy of an exempt license be extended to "honorary" consuls, or only to those actively in charge of the affairs of a foreign government?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

A consul is the commercial agent of his country, appointed to watch over the mercantile interests of the appointing country and of its subjects. The vice consul takes charge in the absence of the consul. An honorary consul is a person in possession of title without performing services or receiving any emoluments. Before recognition is given to such officials, there must be evidence that they have been recognized as such officials by the executive branch of our Federal government.

There is no Florida statute granting such representatives of foreign governments any exemption, and, therefore, any authority for such exemption would have to arise by virtue of Federal legislation or treaty.

MOTOR VEHICLES—Licenses

Article XX of the Multipartite Treaty between the United States of America and other American Republics, signed at Habana February 20, 1928; ratification of the United States of America deposited February 8, 1932; proclaimed February 11, 1932; 47 Stat., Part 2, 1976, 1980; Treaty Series, No. 843; Trenwith, Treaties, IV: 4738, 4741; 155 League of Nations Treaty Series, pages 291, 301, provides as follows:

"Consular agents, as well as the employees of the consulate who are nationals of the state appointing them, *not engaged in business with purposes of gain*, in the state where they perform their functions, shall be exempt from all national, state, provincial, or municipal taxes levied upon their person or property except such taxes as may apply to the possession or ownership of real estate located in the state where discharging their duties or to the proceeds of the same. Consular agents and employees who are nationals of the state they represent, are exempt from tax on the salaries, honorariums, or wages which they receive in return for their consular services."

It is to be noted that the exemption for national, state or municipal taxes exists only when such consuls are not engaged in other business with purposes of gain in the state where they perform their functions.

It is my opinion that the courtesy of an exempt license should not be extended to any consul who is a national of the foreign country appointing him, if such consul is engaged in other business with purposes of gain in the state where he may perform his functions.

LICENSES

June 20, 1941.—041-342.

"FOR HIRE"—DEFINITION

QUESTION: Agents of the Flamingo Truck Lines receive goods which are shipped to them at their place of business, from point to point, and are paid on a commission basis; some of these local agents, for the sole purpose of encouraging the company's business, take it upon themselves to deliver this freight in their own trucks, free of charge to the consignee. Should such local agents be required to purchase "For Hire" license tags?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Pursuant to the provisions of law as stated in Section 1285 Compiled General Laws of Florida, Permanent Supplement, page 538, when freight is transported in a motor vehicle, and the freight transported is not owned exclusively by the person, association, firm or corporation owning such vehicle, so that there is identity of ownership between the vehicle and the goods, such transportation is deemed "for hire."

Therefore the local agents of the Flamingo Truck Lines who receive goods shipped to them at their place of business, and are paid on a commission basis, and who subsequently deliver said merchandise without any charge to the consignee, in their own trucks, would have to purchase "For Hire" tags.

LICENSES

September 3, 1941.—041-514.

"FOR HIRE"—DEFINITION

QUESTION: The owner of a truck has a contract with the Greenwood Peanut Company, of Greenwood, Florida, to haul all of their pea-

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nuts purchased in Alabama and Georgia to their plant in Greenwood, Florida. The truck also picks up peanuts after they have been shelled and graded at the plant in Greenwood, and hauls them to Panama City and other points within the state. Compensation therefor is paid by the Greenwood Peanut Company. One of said trucks operates entirely within the state of Florida, and the owner thereof has been required by your department to have a "for hire" license. Under Section 1285, Compiled General Laws of 1927, is the owner hauling agricultural products so as not to come under the "For Hire" provisions?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 1280, Compiled General Laws of Florida, provides as follows:

"'For hire' as defined in this Chapter shall include all motor driven vehicles, or trailers hauled by a motor vehicle, in use for transporting persons, commodities or materials for compensation, or such motor vehicles as may be let or rented to another for a consideration; Provided, that motor vehicles temporarily used by farmers for the transportation of agricultural or horticultural products from farm or groves to packing houses or to points of shipment by transportation companies shall not be held to be operating for hire . . ."

In construing the foregoing section, the Honorable Fred H. Davis, as Attorney General, in an opinion rendered by him dated February 27, 1929, said:

"In order for a vehicle to come within the exemption set forth in the proviso of this Section as above stated, the motor vehicle in question must be used by a 'farmer' and it must be used by him for the transportation of agricultural or horticultural products from farms or groves to packing houses, etc.

"You will notice under the definition of a 'for hire' vehicle a truck leased to a farmer to haul his commodities in would be deemed a 'for hire' truck under this Section, and the purpose of the proviso was to allow a farmer to lease from his neighbors or from any other person a truck to be used in hauling his agricultural or horticultural products without making such leased truck subject to a 'for hire' license.

"There is no justification for extending the exemption further than its plain purpose and intent as several attempts have been made in the Legislature to extend the exemption and the Legislature has voted such attempts down, thereby indicating that the Legislature was satisfied to leave the exemptions limited to apply only to leased motor vehicles used by farmers.

"Under the above Section of the law a farmer has no right to engage in a 'for hire' transportation business without having a license therefor any more than any other person.

"The language of the law is that motor vehicles 'temporarily used' by farmers are exempt from the 'for hire' license tax.

"Under this language only automobiles which do not belong to the farmers but which they acquire a temporary use of by means of rent, contract or lease, are within the purview of the statute and only these are exempt. All other trucks than those 'temporarily leased' to farmers engaged in the hauling of agricultural or horticultural products for hire are subject to a 'for hire' license tax."

Section 1285, Compiled General Laws of Florida, Perm. Supp., reads in part as follows:

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"Provided, however, that vehicles used in the transportation of horticultural and/or agricultural products are used in the transportation of horticultural or agricultural supplies direct to the growers or consumers of said supplies or to associations of said growers and consumers shall not be deemed 'For Hire' vehicles within the terms of this Act."

Honorable George Couper Gibbs, as Attorney General, rendered an opinion on October 20, 1937, in which, after quoting Sections 1280 and 1285, *supra*, he said:

"It may readily be seen that the last statutory provision hereinabove set forth merely enlarges the exemption provided for in the first statutory provision. In view of the fact that the last statutory provision was enacted by the Legislature of 1933 and the first statutory provision was enacted by the Legislature of 1925, the provision last above set forth must, in the event of a conflict between the two, prevail.

"It is therefore my opinion that under that portion of Section 1285, Compiled General Laws, Supplement, it is not necessary for one transporting citrus fruits, which are certainly agricultural or horticultural products, to register the vehicles so used as 'For Hire' vehicles."

Since the opinion last aforesaid was rendered, the Supreme Court of Florida, in the case of *State ex rel. Sanders vs. Ramsey*, 189 So. 39, has had occasion to consider Section 1285, *supra*. The pertinent facts in that case were as follows:

The petitioner was transporting unshelled peanuts from Pond Brothers Peanut Company, Inc., brokers and dealers in peanuts, Suffolk, Virginia, to Bonacker Brothers, Inc., general wholesale produce dealers and distributors at Tampa, Florida, in a motor vehicle and without a certificate of public convenience and necessity, although the tractor and semi-trailer bore Florida license plates. The petitioner in that case reasoned that, in view of the provisions of Section 1285, *supra*, he was not operating a vehicle for hire. The Supreme Court, however, said:

"(2) The exception in the next quoted act (Sec. 1285, C.G.L., Perm. Supp.) is that vehicles used in carrying agricultural products or supplies direct to consumers or associations of growers and consumers shall not be considered as used for hire. Again, the record of a carriage of peanuts from a company in Virginia to a company in Tampa seems to fail utterly in bestowing upon petitioner the benefit of this provision, which it is argued places the petitioner's vehicle in the class of those not used 'for hire,' hence not required to have a certificate because of Section 30 of Chapter 14764, *supra*."

Therefore, in view of the Supreme Court decision aforesaid, you may properly require the owner of the truck mentioned in your communication dated September 2, 1941, to procure a "for hire" license for the truck or trucks engaged in the business described in said communication.

LICENSES

April 22, 1941.—041-220.

"FOR HIRE"—PRIVATE CARRIERS

QUESTION: Is it necessary for a private carrier delivering freight to procure a "For Hire" tag for motor vehicles that are operated solely within the limits of a municipal corporation?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 1285 Compiled General Laws of Florida, Permanent Supplement, p. 538, in part provides as follows:

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"... When freight or passengers are transported in a motor vehicle for compensation, outside the limits of any municipal corporation in this State, or when freight is transported in a motor vehicle and the freight transported is not owned exclusively by the person, association, firm or corporation owning such vehicle, so that there is identity of ownership between the vehicle and the goods, such transportation shall be deemed 'for hire.' . . ."

The provisions of law hereinabove set forth clearly indicate that "for hire" transportation includes transportation of freight or passengers for compensation outside the limits of any municipal corporation in this State, or transportation of freight in vehicles owned by persons other than the owners of the freight. The word "or" appearing in the statute separates the statute in two independent parts. The latter portion of the statute does not define any territorial limitation, and, therefore, would include motor vehicles used for such purpose wherever operated.

It is, therefore, my opinion that a "For Hire" tag is necessary upon motor vehicles engaged in the transportation of freight owned by persons other than the owners of the freight even though the motor vehicles be operated entirely within the limits of a municipal corporation.

LICENSES

April 22, 1941.—041-214.

"FOR HIRE"—PRIVATE CARRIERS

QUESTION: Certain certified carriers deliver merchandise to local places of business, and the owner or proprietor of such local place of business, under contract with the certified carrier, completes such delivery for a consideration, to the consignee of said merchandise. Are such owners or proprietors of the motor vehicles, in view of the above, required to purchase "For Hire" plates?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 1285 Compiled General Laws of Florida, Permanent Supplement p. 538, provides in part as follows:

"... When freight or passengers are transported in a motor vehicle for compensation, outside the limits of any municipal corporation in this State, or when freight is transported in a motor vehicle and the freight transported is not owned exclusively by the person, association, firm or corporation owning such vehicle, so that there is identity of ownership between the vehicle and the goods, such transportation shall be deemed 'for hire.' . . ."

It is my opinion that under said circumstances, the transporting comes within the provisions of the law hereinabove set forth. The statute clearly contemplates the transporting of freight for a consideration, when such freight is not owned exclusively by the owner of the motor vehicle used. The owners of the motor vehicle are not the consignees of the freight, and would, therefore, pursuant to the provisions of this law, be required to purchase "For Hire" plates.

LICENSES

May 22, 1941.—041-283.

"FOR HIRE"—PRIVATE CARRIERS

QUESTION: Where private individuals have contracted directly with the post office authorities to transport mail for the post office in trucks

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not owned by the United States government, but belonging to the operator, are such operators required to purchase "For Hire" tags?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 1285 Compiled General Laws of Florida, Permanent Supplement, page 538, provides in part as follows:

" . . . When freight or passengers are transported in a motor vehicle for compensation, outside the limits of any municipal corporation in this State, or when freight is transported in a motor vehicle and the freight transported is not owned exclusively by the person, association, firm or corporation owning such vehicle, so that there is identity of ownership between the vehicle and the goods, such transportation shall be deemed 'for hire.' . . ."

Paragraph 12 of Section 1285 Compiled General Laws of Florida, Permanent Supplement, page 541, provides as follows:

"This Chapter shall not apply to any motor vehicle, trailer, or semi-trailer, owned and operated by the Federal Government. . . ."

Paragraph 14 of Section 1285 Compiled General Laws of Florida, Permanent Supplement, page 542, provides as follows:

"The State motor vehicle commissioner shall have authority to determine the classification of, and the amount of tax due on any motor vehicle required to be registered under the laws of Florida, and shall have authority and power to fix, determine and assess the amount of registration or reregistration fees and taxes to be paid for registration, reregistration and license thereof and his determination when made and certified to in writing shall be prima facie evidence of the validity, regularity and propriety thereof and of the liability of the motor vehicles involved therein to classification and tax so determined, fixed and assessed. No such determination when made by the State motor vehicle commissioner shall be disregarded or set aside in any court, except when clearly shown to be unwarranted in law or in fact."

The Federal government pays private contract carriers for transporting of mail according to the volume of mail carried. The trucks are registered in the names of the owners and operators, and the vehicles in question are susceptible of being used for other than government business. Our statute contemplates the transporting of freight for a consideration when such freight is not owned exclusively by the owner of the motor vehicle used, which appears to be the present situation.

Our statute provides that this law should not apply when the motor vehicle is owned and operated by the Federal government. The motor vehicles in question are neither owned nor operated by the government. The imposition of a "For Hire" license upon such motor vehicles does not amount to an encroachment upon the sovereignty of the Federal government. The State of Florida possesses the right to make a charge for the road facilities which it furnishes, and as to private contract carriers of United States mail, a "For Hire" license does not challenge the supremacy of the Federal government and does not deprive Congress of the power to supplement State regulated laws with respect to the use of post roads. The contract carriers are subject to State control as to the method by which they shall perform such services in our State.

In my opinion, a private contract carrier holding a contract with the United States government for the transportation of mail for compensation, may properly be required to secure a "For Hire" license for his motor vehicle used in such transportation.

MOTOR VEHICLES—Licenses**LICENSES**

October 15, 1941.—041-575.

MAINTENANCE TAGS—TRACTORS AND TRAILERS

QUESTION: Does Chapter 20210, Acts of 1941, contemplate that a maintenance tag should be placed on both units of tractor and trailer combination?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 1 of this Act, among other things, provides that no motor vehicle, or combination of vehicles shall be operated on a public highway in this State with a gross weight, including the weight of such vehicle or vehicles, in excess of 40,000 pounds.

Section 7 of this Act, as amended by Chapter 20919, Laws of Florida, Acts of 1941, is as follows:

"After the first day of July, A. D. 1939, it shall be unlawful to operate upon the highways of this State, a truck, the gross weight of which shall exceed 18,000 pounds, or a tractor and semi-trailer combination, as hereinabove described, the gross weight of which shall exceed 34,000 pounds, without first having purchased from the State Motor Vehicle Commissioner and affixed to said motor vehicle, in addition to any other license plate or tag which its owner or operator may be required to purchase by the statutes of Florida, a license plate or tag to be known as a Maintenance Tag.

"Before operating any motor vehicle which shall exceed the gross weights above set forth in this section, its owner or operator shall apply to the State Motor Vehicle Commissioner of Florida for a Maintenance Tag therefor, and shall register with him a description of the motor vehicle on which said Maintenance Tag shall be placed, in the same manner as is provided for in registering motor vehicles prior to the purchase of license plates or tags by the laws in force in this State. . . ."

It is my opinion that the "motor vehicle" referred to above, means any combination of vehicles, including a tractor and trailer which exceeds the gross weight set forth. For the purposes of this Act, I believe the tractor and trailer should be considered as a single unit and the maintenance tag affixed to the tractor.

LICENSES

June 25, 1941.—041-324.

MOTOR VEHICLES—CLASSIFICATION

QUESTION: What tag is required to be purchased by individuals who operate privately tagged pick-up trucks, stake-body trucks, coaches and trucks with improvised bodies, for transportation of passengers?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 1285 Compiled General Laws of Florida, Permanent Supplement, Volume 1, pages 536 and 537, provides in part that "C" Series tags are required on such vehicles. The charges for "C" Series tags are at the rate of \$1.50 per cwt. and \$10.00 for each passenger, if the vehicle carries more than seven passengers.

MOTOR VEHICLES—Licenses**LICENSES**

March 22, 1941.—041-145.

NON-RESIDENT DEALERS—BONDS—SURETY

QUESTION: Does invalidation of portion of Section 1, Chapter 18032, Laws of 1937, apply to Section 2 of same Act?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Please be advised that the order of the Federal Court in the case of Wm. B. Patterson vs. D. W. Finley, was as follows:

"It is ordered and decreed that the defendant, D. W. Finley, be and he is hereby permanently enjoined from requiring the execution of the surety bond as provided for by Chapter 18032, Acts of Florida, 1937."

Section 5 of Chapter 18032, Laws of 1937, provides as follows:

"If any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this Act, but shall be confined in its operation of the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which such judgment shall have been rendered."

Section 5 specifically provides that the invalidation of any portion of this Act shall not affect or impair the remainder of the Act. The order of the Federal Court permanently enjoined the execution and delivery of a surety bond, as provided in Section 1, and that is the only portion of said Act which has been declared unconstitutional. The balance of Section 1, not affected by this provision, would still be the law in all cases.

It is, therefore, my opinion that the partial invalidation of Section 1 does not apply or affect Section 2 of this Act.

LICENSES

February 20, 1941.—041-79.

NON-RESIDENTS—REGISTRATION

QUESTION: Shall a non-resident in military service in Florida who shall enter his children to be educated in the public schools of the State of Florida be required to register his motor vehicle in this State if such motor vehicle is to be operated on the highways of this State?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Chapter 19252, Acts of 1939, provides as follows:

"The provisions of law authorizing the operation of motor vehicles over the highways of the State of Florida by non-residents of this State, when such vehicles shall be duly registered or licensed under the laws of some other State or foreign country, shall not apply to any non-resident who shall accept employment, or engage in any trade, profession or occupation in this State. *In every case where a non-resident shall accept employment, or engage in any trade, profession or occupation in the State of Florida, or shall enter his children to be educated in the public schools of the State of Florida, such non-resident shall be required to register his motor vehicles in this State, if such motor vehicles are proposed to be operated on the highways of the State of Florida.*"

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Under a literal interpretation of the above statutory provision, any non-resident who enters his children in the public schools to be educated, would be required to obtain a Florida license for his automobile. When the intent of the Legislature is clear and ascertainable, and such intent is not consistent with the strict letter of the statute, then the Court will follow the intention of the Legislature, not the statute.

The following is from the opinion of the Supreme Court of Florida, in the case of *Curry vs. Lehman*, 47 So. 18, headnote 2:

"The intention of the Legislature in enacting a law is the law itself, and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute. The court will not follow the letter of the statute, when it leads away from the true intent and purposes of the Legislature . . ."

The above statutory provision was enacted for the purpose of requiring winter tourists to pay a license tax when they enter their children in the public schools of the State of Florida. The emergency brought about by our National Defense program undoubtedly was not considered when this law was enacted. A person in the armed forces of this country does not come to Florida to enjoy the privileges of our State, but only because it is necessary that he share the responsibilities of service in our armed forces. The length of time that he will remain is indefinite, depending upon the existence of the present emergencies and requirements of military service. In most cases the military service of a non-resident commenced before coming to Florida, and merely continues within the State. It is unlike the visit of a non-resident who comes here to sojourn, and sends his children to our schools.

Great care and discretion should be exercised in enforcing the provisions of the statute above set forth. It should be enforced in the light of the legislative intent. To enforce it in the case of a non-resident assigned to military service in Florida, would be an over-zealous enforcement of the strict letter, while overlooking the intention of the Legislature.

It is, therefore, my opinion that when a non-resident is assigned to military service in Florida, and enters his children in our public schools, he would not have to register his motor vehicle in this State until the expiration of his home state registration.

LICENSES

March 5, 1941.—041-113.

NON-RESIDENT'S TRUCKS—REQUIREMENTS

QUESTION: Are out-of-state trucks that work entirely within the limits of the Tallahassee Air Base Government Field required to have Florida licenses?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Chapter 19252, Acts of 1939, relating to the operation of motor vehicles by non-residents and requirements of registration, in part provides as follows:

" . . . In every case where a non-resident shall accept employment, or engage in any trade, profession or occupation in the State of Florida, . . . such non-resident shall be required to register his motor vehicles in this State, if such motor vehicles are proposed to be operated on the highways of the State of Florida."

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The above provision of the statute would require out-of-State truck owners to pay a license tax for operating their motor vehicles on the highways of the State when they are engaged in any occupation within the State. They are in competition with citizens of Florida and obtain work that might otherwise be available for residents of this State. The motor vehicles in question could not reach the Air Base without traveling over our public streets or highways. No possible construction of the provisions of our statutes could be reasonably made which would exempt out-of-State truck owners from the payment of a license tax, where they are engaged in trade, profession or occupation in the State of Florida.

It is my opinion that out-of-State trucks, even though working entirely within the limits of the Air Base, are required to purchase Florida licenses.

LICENSES

March 21, 1941.—041-144.

OPERATORS—REGISTRATION

QUESTION: Crowley's, Inc., a Florida corporation, during four or five months of each year, obtains milk from New York State and hauls it from that state, in its own trucks, to various cities in Florida, namely, Jacksonville, Miami, Orlando and Tampa, and on return trips to New York as the trucks may make, hauls Florida produce. This company also does business in New York, and during about seven months in each year the trucks will be engaged in business in that state. Are the trucks belonging to Crowley's, Inc., and operating in Florida, required to have Florida registration?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 1281 of the Compiled General Laws of Florida of 1927, states in part as follows:

"Every owner, or person in charge of a motor vehicle or vehicles, trailer, semi-trailer, or motorcycle side car, which shall be operated or driven upon the highways of the State, or which shall be maintained in this State, shall for each such vehicle or vehicles so owned, cause to be filed by mail or otherwise, in the office of the State Motor Vehicle Commissioner of the State of Florida, a certified application for registration . . ."

It is to be noted that this section has direct application to motor vehicles that are operated upon the highways of the State of Florida and owned by residents of this State. It appears to me that the operation of Crowley's milk trucks, for four or five months of each year, upon the highways of the State of Florida, such trucks being locally owned, as Crowley's, Inc., is a Florida corporation, would be required to purchase Florida registration for each of its trucks operated within the State of Florida.

I note that it had been the former practice of the Motor Vehicle Commissioner to allow Crowley's, Inc., to register half of the trucks which are operated in Florida for this four or five months period, and allow the other half of the trucks to carry New York license registration. The basis for this permission was predicated pursuant to Chapter 19479, Laws of 1939, which was an Act authorizing the State Motor Vehicle Commissioner, the State Road Department and Railroad Commission of the State of Florida to consummate reciprocal agreements with the proper authorities of other states, relative to the operation of motor vehicles by non-residents over the highways of this State.

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It does not appear to me that this reciprocal agreement statute would have application to Crowley's, Inc., because said statute specifically relates to the operation of motor vehicles within the State of Florida by non-residents. Crowley's, Inc., being a Florida corporation, would not be a non-resident within the meaning of this statute, and therefore, whether or not you have consummated a reciprocal agreement with the State of New York, I believe that its application should not be extended to Crowley's, Inc., a Florida corporation.

It is, therefore, my opinion that Crowley's, Inc., a Florida corporation, is required to secure separate registration for each of its trucks operated in the State of Florida.

LICENSES

November 20, 1942.—042-531.

OPERATORS—REGISTRATION

QUESTION: Is a motor vehicle operated on the highways of Florida required to be registered regardless of whether it is operated by the true owner or otherwise?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 320.01 (3) Florida Statutes, 1941 defines "owner" as follows:

"'Owner' includes any person, firm, corporation, or association controlling any motor vehicle by right of purchase, gift, lease or otherwise."

Section 320.02, Florida Statutes, 1941, providing for registration of motor vehicles, provides as follows:

"Every owner, or person in charge of a motor vehicle, trailer, semi-trailer, or motorcycle sidecar, which shall be operated or driven upon the highways of the state, or which shall be maintained in this state, shall for each such vehicle so owned, cause to be filed by mail or otherwise, in the office of the state motor vehicle commissioner of the State of Florida, a certified application for registration of same on a blank to be furnished for that purpose, containing: . . ."

The above sections require all vehicles operated or driven on the highways of the State of Florida to be registered regardless of whether they are operated by the true owner or otherwise.

The State has a right to license motor vehicles whether owned by residents or non-residents and one claiming exemption must clearly show his right thereto which must be strictly construed against him and in favor of the public. See *Harper vs. England*, 168 So. 403. Such motor vehicle, therefore, must be registered in Florida and pay license tax except in cases specifically exempt by law.

A Florida resident operating a motor vehicle of a non-resident (not employed by non-resident) bearing a foreign tag can only base his refusal to comply with Florida registration laws on Section 320.37 of the Florida Statutes of 1941, which provides:

"REGISTRATION NOT TO APPLY TO NON-RESIDENTS.—The provisions of this chapter relative to registration and display of license number plates shall not apply to a motor vehicle owned by a non-resident of this state, other than a foreign corporation doing business in this state; provided, that the owner thereof shall have complied with the provisions of the law of the foreign country, state, territory or federal district of his residence, relative to motor vehicles and the operation thereof, and shall conspicuously display his registration number as

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required thereby; but such exemption shall not apply to motor vehicles operated for hire."

As defined in Section 320.02, cited above, for the purpose of registration and license the word *owner* does not merely include possessor of legal title, but it also includes any person *controlling any motor vehicle by right of purchase, gift, or otherwise*. The resident of this State who assumes control and custody of a motor vehicle of a non-resident cannot operate such motor vehicle without Florida registration and license and such resident is not excepted under Section 320.37, Florida Statutes, 1941. Such operator has the right to apply for registration and license showing the ownership thereof in the name of the true owner, with himself as lessee or bailee, or otherwise.

This conclusion reached in this opinion reaffirms opinion of Attorney General of October 10, 1929, found in Biennial Report for 1929-1930, on the same subject.

LICENSES

June 10, 1941.—041-323.

PLATES—EXCHANGE IN SERIES—ENFORCEMENT

QUESTION: Does the Motor Vehicle Commissioner have the authority to enforce the exchange of license tags where a tag of the plain series, priced at \$10.00, is sold for a vehicle which is later found to be in the weight class that places the vehicle in the "D" series, priced at \$15.00, and what court action would be proper in a case charging the use of an improper license plate?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Sub-section (15) of Section 3 of Chapter 16085, Laws of Florida, Acts of 1933, provides in part as follows:

"It shall be unlawful for any person to operate on or over the highways of this State or on any road or street, therein any motor vehicle which, at the time of such operation, shall not have affixed thereto front side out and top of tag up the *proper license plate or tag* issued by the State Motor Vehicle Commissioner showing payment of the registration or re-registration fee and taxes provided by this Section, and every person so offending against the provisions of this Section, whether the owner or having any interest in the motor vehicle involved or not, shall be deemed guilty of a misdemeanor and punished by a fine not exceeding Five Hundred Dollars (\$500.00) or by imprisonment in the county jail not exceeding six months. Each separate day of operation in violation of the provisions of this Section shall be considered as a separate and distinct offense. . . ."

You will note that this section of our laws renders it unlawful for anyone to operate a motor vehicle upon the highways of this State without a proper license plate or tag, and imposes a penalty for violation thereof. Even though they originally purchased plain series tags in good faith, at the same time the law does not permit them to profit because of a mistake as to the weight of their automobile. I believe the word "proper license plate" means exactly that, and notwithstanding the mistake, they must comply with the provisions of our law and exchange the plain series plate for the "D" series, and pay the increased fee.

It is, therefore, my opinion that you would have authority to enforce the exchange of plates, and you could cause to be instituted criminal prosecution as provided in the sections of our law stated hereinabove.

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June 16, 1942.—042-295.

PLATES EXCHANGED—SERVICE CHARGE

QUESTION: When a passenger car for private use is put into for-hire service, or a passenger car is converted into a truck, the Tag Agent performing the same service in issuing a tax in exchange for another as in the initial registration, is he entitled to a service charge of 25c?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 1281 Compiled General Laws of Florida, 1927, Permanent Supplement, provides for a service charge of 25c for each application for a license tag which is handled by the Tax Collector.

When the character of use of an automobile is changed and a new or different tag is required, it is necessary that a new application be made for such new tag, and the Tax Collector is required to perform the same service in connection therewith as he performed in connection with the original application for a license tag.

It is therefore my opinion that the service charge of 25c should be charged by the Tax Collector for handling the application for the new tag.

LICENSES

November 18, 1941.—041-653.

RECIPROCAL AGREEMENTS—CONSUMMATION

QUESTION: Has the Motor Vehicle Commissioner authority to consummate reciprocal agreements with Georgia and Virginia concerning maintenance tax on motor vehicles provided for in Chapter 20210, Acts of 1941?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Under the provisions of Chapter 19479, Laws of Florida, Acts of 1939, the Motor Vehicle Commission, The State Road Department and The Railroad Commission are authorized to consummate Reciprocal Agreements with other states granting motor vehicles of such other states such privileges and exemptions in the operation of such vehicles in this State as residents of this State may have and enjoy in the operation of their motor vehicles in such other states.

Therefore, this Act is ample authority for you, together with The State Road Department and The Railroad Commission, with the approval of the Governor, to extend the provisions of the existing Reciprocal Agreements between the State of Florida and the State of Georgia, and between the State of Florida and the State of Virginia, to include the maintenance tax requirement of Chapter 20210, Laws of Florida, Acts of 1941, provided, of course, that these Reciprocal Agreements require the observance of the maximum weight, height, width and length provisions of the Laws of Florida.

LICENSES

February 20, 1941.—041-76.

ROAD WEIGHT—CHARGE

QUESTIONS: (1) Is a cement mixer which can be used on or off the body or chassis of a truck, part of the truck or load?

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(2) Should a license be charged for factory shipping weight or road weight?

(3) Is the weight of accessories attached to cars part of the road weight of such motor vehicle?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

(1) We understand the cement mixer you refer to is one which has a revolvable drum adapted to receive material at one end and discharge it at the other. A common type of cement mixer is a four-wheel vehicle coupled to or drawn by a motor vehicle, or, in the alternative, it can be placed on a truck and transported from place to place. Another is a mixer which is specially built on a truck manufactured for that purpose.

It is my opinion that if the mixer is used on the body of the truck for the purpose of mixing the material, then even though it be portable and can be placed on wheels, the weight should be added to the truck weight. If the cement mixer is specially built and part of the truck, and performs its function while on the truck, then the weight of the mixer should be added to the weight of the truck. In the event no mixing is performed on the truck, then the weight of the mixer becomes part of the load.

(2) It is my opinion that the license should be charged for actual road weight, and not factory shipping weight. The weight usually given by the manufacturer includes the weight of the chassis and cab attached thereto. Frequently the owner of a truck adds a body, which increases the gross weight of the motor vehicle. If the license is to be charged for factory shipping weight, then a manufacturer or purchaser could very easily evade the spirit and manifest purpose of the Motor Vehicle law. A purchaser could buy a truck composed of a chassis and cab, and the following week buy a body for the same truck, which he would attach thereto. In such event, the factory weight of the chassis and cab would be less than the actual road weight of the truck.

The Motor Vehicle License fee should be based upon the actual road weight of a fully equipped motor vehicle.

The Supreme Court of Ohio has defined "Weight of motor vehicle" in the case of *State, ex rel. Bennett vs. Daily*, State Registrar of Motor Vehicles, et al, 190 N.E. 148, in part as follows:

"'Weight of motor vehicle' for purpose of determining license fee held weight after addition to truck of body equipment, though manufacturer sold merely chassis and cab and represented weight thereof as 'fully equipped.'"

(3) If the accessories are attached to the car and added to the road weight, then the additional accessory weight should be included in the road weight as part of a fully equipped motor vehicle.

LICENSES

May 8, 1941.—041-244.

ROAD WEIGHT—CLASSIFICATION

QUESTION: Is the weight of well drilling machinery affixed to a truck to be added to the net weight of a motor vehicle for the purpose of determining license tax classification?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 1285 Compiled General Laws (1011) provides a sliding scale

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of registration fees for trucks, the fees depending upon the net weight of the vehicles. Net weight has been defined in said law as follows:

"Net weight shall be construed to be the actual scale weight with complete catalog equipment."

This definition appears to me to clearly define the weight upon which the registration fee shall be based. It means the weight of the truck, including the cab, chassis and body.

I do not believe that the well drilling machinery may be considered as part of the body of the truck. It would be part of the load. The reason that the tax imposed upon vehicles is graduated and increases with the weight of the vehicles is no doubt due to the belief of our Legislature that the damage done to the highways increases in proportion to the weight of the vehicle and the load. The increased tax is the compensation for the use of the highways. However, the Legislature must obviously have taken into consideration, when classifying the license tax, that the vehicles involved would necessarily carry a load based upon the capacity and weight of the truck. The trucks in question carry no load except the well drilling machinery, which can be removed if necessary.

It is, therefore, my opinion that the well drilling machinery should be considered as part of the load, and not included as part of the net weight upon which the license tax is based. Your registration fee should be based upon the weight of the truck, including the cab, chassis and body of the motor vehicle.

LICENSES

June 25, 1941.—041-347.

SALES—RULES AND REGULATIONS

QUESTION: Is it mandatory on the Motor Vehicle Department to issue and deliver license plates?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Chapter 16085, Laws of Florida, Acts of 1933, Section 1281 Compiled General Laws of Florida for 1927, Permanent Supplement, Vol. 1, page 531, provides that the Tax Collectors in the several counties of the State of Florida shall deliver license plates to applicants, subject to the requirements of law, and in accordance with rules and regulations to be prescribed with reference thereto by the State Motor Vehicle Commissioner.

Under this statute you do not have the authority to refuse to issue license tags from your office, and if requested for a tag by an automobile owner anywhere in the State, such tag would necessarily have to issue. However, it is my opinion that you may issue rules and regulations applicable to automobile tag distribution, which will specify a requirement for residents of counties to obtain their tags from the own Tax Collectors. This can only be a persuasive regulation, and cannot be enforced mandatorily.

Should you make such a regulation, you should also, in my opinion, make exceptions therein for persons out of the State, who desire for convenience to get their license tags direct from the Motor Vehicle Commissioner's office; for persons who want a tag of a certain county and who at the time of purchase might not be in that county; and for persons who would find it more convenient to get their tags from the Commissioner.

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LICENSES

October 14, 1941.—041-574.

SCHOOL BUSES—CLASSIFICATION

QUESTION: (1) Is the Motor Vehicle Commissioner required to issue tags on vehicles used exclusively in transporting pupils for flat sum of \$25.00 under Chapter 20310, Acts of 1941?

(2) Can private tag be used for vehicle not used exclusively in transporting pupils?

(3) Is there a distinction between vehicles used for private as well as public schools?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

(1) You are required under the provisions of this Act to issue K Series tags to vehicles used exclusively for the purpose of transporting pupils to and from school for the sum of \$25.00 flat instead of the old rate of 60c per cwt.

(2) Section 1280 Compiled General Laws of Florida, 1927, after defining "For Hire" adds this proviso:

"Provided further, that motor vehicles used for transporting school children to and from school, under contract with school officials shall not be deemed to be in use for hire."

The K Series tag referred to in Chapter 20310, Acts of 1941, applies only to motor vehicles used exclusively for the transportation of pupils to and from school. If, in addition to this purpose, the motor vehicle is used for the transportation of other persons or property for compensation, then it should be required to carry a "For Hire" tag. If the particular motor vehicle is used for private purposes in addition to being used for the transportation of school children to and from school, *under contract with school officials*, then it is my opinion that a private tag would be required. If the transportation of school children is not pursuant to a contract with school officials as contemplated by Section 1280, Compiled General Laws of Florida, 1927, the facts in each particular case would necessarily determine whether such transportation could be deemed "For Hire."

(3) I do not believe that any distinction should be drawn between private schools and public schools.

LICENSES

March 31, 1941.—041-174.

SECOND-HAND DEALERS—REGISTRATION FEES—REFUND

QUESTION: Does the Motor Vehicle Commissioner have the authority to refund R. S. Evans, Inc., Miami, Florida, certain premiums paid by them as "Out of State Dealers in Second-hand Automobiles," under Section 1 of Chapter 18032, Laws of 1937?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

One of the questions presented for determination is whether the payment of filing fees by R. S. Evans, Inc. was voluntarily or involuntarily made. The Supreme Court of Florida, in *St. Johns Electric Co. vs. City of St. Augustine*, 88 So. 387, has declared:

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"Taxes are not 'voluntarily paid,' within the rule that precludes a recovery, even if illegally exacted, where the failure to pay is a penal offense, and payment is made to avoid proceedings to enforce the penalty."

It appears from an examination of Chapter 18032, Acts of 1937, that the failure to pay filing fees for bonds is a penal offense. Section 3 provides in part as follows:

"No action, nor right of action to recover any such motor vehicle, nor any part of the selling price thereof, shall be maintained in the Courts of this State by any such dealer or vendor, his successors or assigns, in any case wherein such vendor or dealer shall have failed to comply with the terms and provisions of this Act, and in addition thereto such vendor or dealer, upon conviction for the violation of any of the provisions of this Act shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than \$100.00 and not more than \$500.00 or by imprisonment for not less than thirty days nor more than six months, or by both such fine and imprisonment. . . ."

This would indicate that the payment of filing fees by R. S. Evans, Inc. was involuntary, as the failure to pay subjects them to criminal prosecution. There is a further question involved, and that is whether demand for return of filing fees has been seasonably made. Section 5 of Chapter 11901, Acts of 1927, provides in part as follows:

" . . . all moneys collected shall be paid over to the State Treasurer within one week after the correct amount due has been ascertained by proper audit, which audit shall be made semi-monthly by competent auditors . . . "

You have advised us that all moneys paid by R. S. Evans, Inc. have been transferred to the State Treasurer. The Supreme Court of Florida has declared in *Seaboard Air Line Ry. Co. vs. Allen*, 89 So. 555, that any action to recover money illegally collected must be brought before the money has been turned over to the State or County authorities by the collecting agent. Headnote 3 states:

"The action by the taxpayer to recover back taxes illegally assessed and collected must be brought against the tax collector before he turns the money collected over to the state and county authorities."

It is further stated (text 558):

" . . . In cases where the collector acts under the warrant of the assessor, which is the collector's authority for proceeding in the case, and he undertakes the collection of a tax on lands described upon the tax roll, and the tax is valid upon the face of the roll, and there is no defect in the collector's authority, he acts as an agent for the county and state, and so long as he holds this money in his possession, or is notified of the claim before paying it over to the proper officer, he is liable as for money had and received if the tax is illegal. See *Craig vs. Boone*, 146 Cal. 718, 81 Pac. 22; *Commonwealth vs. Baske*, 124 Ky. 468, 99 S. W. 316; *Cooley on Taxation* (3d Ed.) 1482. The payment of the money over to the county and state authorities, however, before he has any knowledge of the illegal assessment or lack of his authority, relieves him from liability."

It, therefore, appears that while the payment was involuntary, demand was not seasonably made. The funds are not in your possession or control, and you do not have the ability to comply with the demand.

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It is my opinion that R. S. Evans, Inc., Miami, is not entitled to recover such fees which it paid pursuant to the provisions of Section 1 of Chapter 18032, Acts of 1937.

LICENSES

March 6, 1942.—042-108.

TRAILERS—TAX

QUESTION: Are trailers subject to ad valorem tax?

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 13, Article IX, of the Constitution of Florida is as follows:

"Motor vehicles, as property, shall be subject to only one form of taxation which shall be a license tax for the operation of such motor vehicles, which license tax shall be in such amount and levied for such purpose as the Legislature may, by law, provide, and shall be in lieu of all ad valorem taxes assessable against motor vehicles as personal property. (Additional section, House Joint Resolution 753, Acts 1929; adopted at general election, November 4, 1930.)"

In the case of Wood, et al., vs. Club Transportation Service, Inc., the Supreme Court of Florida had before it the question of whether "aerocars" were within this constitutional exemption from ad valorem taxes. These particular "aerocars" were two-wheel trailers attached by means of a fifth wheel arrangement to the rear end of automobiles, and had been licensed under the Motor Vehicle License and Registration Laws and carried license tags.

In holding that they were exempt from ad valorem taxes the Court said:

"The aerocars are obviously useless unless they become a part of a motor car for the purpose of increasing its capacity for passengers and baggage without meanwhile increasing the motive power. It would not be logical to conclude that the people meant to relieve a car of ad valorem taxes but to leave subject to that burden a vehicle purely auxiliary to it and dependent upon it for useful operation. Although Section 1280, supra, defines a motor vehicle as one propelled by other than muscular power, we cannot pause there and say that a trailer not being so propelled is therefore not a motor vehicle for if it is not a part of the automobile it is not impelled at all. A study of the Constitution and the expressions of the legislature on the subject seasoned with a modicum of common sense forces us to the view that the position of the appellant is not well taken and that the Chancellor followed the route of logic to a just decision."

Wood, et al., vs. Club Transportation Service, Inc., 196 So. 843.

In view of this language, I do not believe that any distinction could be made between an "aerocar" or two-wheel trailer and a house trailer.

Therefore, no ad valorem tax can be imposed upon a house trailer that has been registered and a license tag tax paid thereon under the Motor Vehicle Registration and License Laws, as the evident purpose of Section 13, Article IX, of the Constitution of Florida was to prohibit double taxation.

However, in the event a house trailer loses its identity as a "trailer" and is stored or permanently parked and used as living quarters, it would become subject to ad valorem taxes upon the expiration of the license tag tax which had been paid thereon.

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LICENSES

March 25, 1941.—041-170.

TRUCKS—REGULATIONS

QUESTIONS: (1) Is it unlawful for a truck to be operated on the highways of Florida after dark when the over-all length of truck and load does not exceed 35 feet?

(2) Is it necessary for trucks carrying loads that protrude from the rear of the vehicle to have affixed thereto a red flag or red light?

(3) When may a driver's license be taken from him?

To Hon. T. T. Oughterson, Attorney at Law, Stuart, Florida:

My interpretation of paragraph 9 of Section 1285, Compiled General Laws of Florida, Permanent Supplement, Vol. 1, is to the effect that only trucks having an over-all length of 35 feet or more, are restricted from operating in the night time. I do not believe that it is a violation of the law when a truck with a smaller over-all length is operated on the highways after dark. So far as I have been able to ascertain, this section of the statute has not been construed by the Supreme Court.

I can find no statute making it a violation of law if the motor vehicles carrying loads that protrude from the rear of same, do not have affixed thereto a red flag during the day time. It is necessary, of course, that the truck have the red light at night. However, no mention is made about this concerning daytime operation.

We do not have any forms of information covering violation of motor vehicle statute. We have no occasion to prepare any, and usually when a case is received by this office, it is transferred to us to handle it in the Supreme Court.

I agree with your construction of law concerning the picking up of driver's license in cases of driving while intoxicated. Section 38 of Chapter 19551, Laws of 1939, which was an Act creating the State Department of Public Safety, etc., provides that there may be a mandatory revocation of license by the Department of Public Safety when a conviction has become final, for the commission of certain offenses. Paragraph 2 of said section provides as one of the offenses driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug. The question arises when an appeal has been taken from the conviction in the County Court whether, in such event, it is a final conviction within contemplation of said section. This matter has not been determined by our courts, although yesterday the Supreme Court granted us a prohibition when we joined in a suit where the Department of Public Safety had made a mandatory revocation of a license for a drunken driving conviction, and the defendant in said case had secured a supersedeas from the Circuit Court under Section 43, and the Court, in said order, had provided that the Department of Public Safety forthwith return the license taken from the defendant. We do not know under what theory the Supreme Court granted us the prohibition. However, it could have been under one of two reasons. In that case the Court exceeded his authority, because he ordered the return of the license, when the provisions of Section 43 provide for a hearing within thirty days, and at such hearing the Court could determine whether the license should be returned. It could have been that the Court granted the prohibition upon the theory that a conviction for drunken driving in the County Court made it mandatory upon the Department to revoke the license, and, therefore, there could be no appeal to the Circuit Court. I do not believe at present that it is possible to take the driver's license from

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him at the time of arrest. I want to call to your attention Section 39, which is authority for the Department to suspend a license.

What I have said here cannot be taken as an official opinion, because under the law this office is only permitted to render official opinions to the Governor and members of his Cabinet. If there is any further information you would desire, please do not hesitate to write me.

LICENSES

May 23, 1941.—041-284.

TRUCKS—REGULATIONS

QUESTION: Are the owners of trucks being used entirely within the Tallahassee Air Base required to purchase a license tag? The trucks are leased to the United States government under a contract whereby the government pays the contractor a certain amount each week or month, and at such time as the aggregate amount paid totals a given sum, which is the value of the truck, then title to same would pass to the government.

To Hon. Henry J. Driggers, Motor Vehicle Commissioner:

Section 1281 Compiled General Laws of Florida, Permanent Supplement, p. 531, provides in part as follows:

"Every owner, or person in charge of a motor vehicle or vehicles, trailer, semi-trailer, or motorcycle side car, *which shall be operated or driven upon the highways of the State, or which shall be maintained in this State*, shall for each such vehicle or vehicles so owned, cause to be filed by mail or other wise, in the office of the State motor vehicle commissioner of the State of Florida, a certified application for registration . . ."

It is to be noted that the law provides whenever a motor vehicle is either operated or driven upon the highways of the State or when it is maintained within the State, the owner is required to purchase a license. You advise that the contractors in question contend that as their trucks are working entirely within the Tallahassee Air Base, which is a United States reservation, that they should not be compelled to purchase a Florida license; that in some instances the trucks were taken to the Tallahassee Air Base during 1940, and in some instances during this present year.

It seems to me that so long as the title to the trucks remains in the contractors, and the trucks were driven to the Air Base during 1941, then certainly it must of necessity be that the trucks have been driven or operated upon the highways of the State of Florida, and pursuant to the provisions of our law, they should be compelled to secure a Florida license.

As to the trucks that were delivered to the Tallahassee Air Base during 1940, and for the present year have not traveled upon any of the highways of the State, I would say that they are required to secure a license tag, because they are being maintained within the State of Florida.

I have examined the type of contract executed by the government and the various contractors, and find that the contractor warrants that he has complied with all Federal, State and municipal laws. The contract is a lease with an option to purchase, and not a conditional sale of the motor vehicle, and title to the motor vehicle would not pass until such time as the government exercised its option to purchase. There-

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fore, when the trucks have either traveled on the highways of the State or are maintained within the State, the contractors would have to purchase a license.

In my opinion, so long as the title to the motor vehicles remains in the contractors, you would have authority to compel the contractors to purchase license for their trucks, even though said trucks are being used exclusively within the Tallahassee Air Base.

LICENSES

January 15, 1942.—042-28.

FEES—DEPOSIT

QUESTION: Should the collections made by the State Department of Public Safety under Chapters 20215 and 20451, Acts of 1941, be deposited to the credit of the same fund in the office of the State Treasurer?

To Hon. J. Edwin Larson, State Treasurer:

Chapter 20451, Acts of 1941, which provides for the licensing of operators of motor vehicles, requires that the State Department of Public Safety transmit all funds received by it to the State Treasurer, to be placed in a fund to be known as the "State Drivers' License Fund," out of which shall be paid the actual and necessary expenses of said department.

Chapter 20215, Acts of 1941, is an Act regulating the manufacture, sale; distribution, use and possession of explosives, and requiring licenses therefor, and constituting the Department of Public Safety as the licensing authority. This Act provides that the amounts received from such license fees shall constitute the fee of the licensing authority for its expenses and services in the performance of its duties under this Act.

It is my opinion that the revenue collected by the Department of Public Safety under these two Acts should not be commingled, but should be deposited to the credit of two separate accounts, in view of the fact that the Explosives Act specifically provides that the fees collected thereunder shall be for the expenses and services of the department in the performance of its duties under said Act.

HIGHWAY PATROL

September 8, 1942.—042-439.

PATROLMEN—POLICE POWERS

QUESTION: Has a highway patrolman the right to arrest a person for interfering with a highway patrolman in the discharge of his duty without offering or doing violence to the patrolman?

To Hon. J. J. Gilliam, Department of Public Safety:

Section 5, Article II, Chapter 20451, Acts of 1941, provides:

"It shall be the duty of all Officers of the Florida Highway Patrol, under the direction and supervision of said Director, to perform the following duties and functions:

"(a) To patrol the public highways and to enforce all State laws now in effect, or hereinafter enacted, regulating and governing traffic, travel and public safety upon the public highways, and providing penalties for violations thereof, including the operation, regulation and licensing of motor vehicles thereon, with full police power to bear arms and to

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arrest persons violating said laws; provided, however, said Patrol Officer shall not be required to patrol city streets, but nothing is intended hereby to prevent them, if necessary in enforcing said State traffic laws, from making arrests within the limits of incorporated cities and towns."

You will note that this section specifically grants "with full police power to bear arms and to arrest persons violating said laws." Traffic laws.)

Section 843.02, Florida Statutes, 1941, provides:

"... Whoever shall obstruct or oppose any such officer or legally authorized person, *in the execution of legal process or in the lawful execution of any legal duty*, without offering or doing violence to the person of the officer, shall be punished by imprisonment not exceeding one year, or by fine not exceeding one thousand dollars." (Emphasis supplied.)

You will note the above section says: "Whoever shall obstruct or oppose any such officer or legally authorized person, *in the execution of legal process or in the lawful execution of any legal duty*."

The Act creating the Highway Patrol gives the officers of the Highway Patrol full police power to bear arms and to make arrests for violations of the traffic laws.

It is, therefore, my opinion that in such cases an officer of the State Highway Patrol has the authority to arrest then and there a person for the offense of obstructing or opposing a State highway patrolman in the execution of any legal duty without offering or doing violence to the person of the State highway patrolman, but process later issued for such offense cannot properly be executed by the patrolman.

At common law an officer has the right to arrest anyone for a misdemeanor committed in his presence, and by the Act creating the State Highway Patrol the officers are given full police powers to make arrests for the violation of the traffic laws, whether the offense be a felony or misdemeanor.

HIGHWAY PATROL

April 29, 1941.—041-241.

PATROLMEN—TRAINING EXPENSE

QUESTION: Has the Director of the Florida Highway Patrol authority to pay traveling, hotel and subsistence expense of representatives of the National Safety Council, Federal Bureau of Investigation and officers from highway patrol agencies of other states and other police officers who are requested to come to Tallahassee to assist in training the Highway Patrol in order to set up a more effective organization and to more efficiently perform their duties?

To Hon. J. J. Gilliam, Director, Florida Highway Patrol:

Section 3 of Article II of Chapter 19551, Laws of Florida, Acts of 1939, provides in part as follows:

"... The Board shall set up and promulgate rules and regulations by which the personnel of the Division of the Florida Highway Patrol Officers shall be examined, employed, *trained*, located, suspended, reduced in rank, discharged, recruited, paid and pensioned. . . ." (Emphasis ours.)

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Section 9 of said laws provides in part as follows:

"...the salaries and expenses of said Florida Highway Patrol shall be paid from 'State Drivers' License Fund,' and the necessary or regular expenses incident to carrying out the provisions of this Act are hereby expressly appropriated from said fund, and the same shall be disbursed from the State Treasury in the manner and according to the same provisions of law as similar funds in the State Treasury are disbursed and expended."

I believe sufficient authority is conferred, pursuant to the above sections of the laws, to permit you to pay traveling, hotel and subsistence expense of instructors for your highway patrolmen when, in your opinion, you believe that your patrolmen should receive such additional instructions in order for them to more efficiently carry out the performance of their duties under the provisions of this Act.

HIGHWAY PATROL

May 1, 1941.—041-232.

SAFETY MAGAZINES—PURCHASE OF SPACE TO PUBLICIZE POLICIES

QUESTION: Would the Department of Public Safety (Florida Highway Patrol) have authority to buy space in any appropriate magazine to give notice to affected officials of the policies of the Department, its rules and regulations, its official actions, et cetera?

To Hon. J. J. Gilliam, Director, Florida Highway Patrol:

I have made a thorough examination of Chapter 19551, Laws of Florida, Acts of 1939, which created the Department of Public Safety. I can find no authority, either express or implied, in said law which would permit you to purchase space in an appropriate magazine to give notice concerning the policies of your Department, its rules, regulations, official actions, et cetera.

HIGHWAY PATROL

April 30, 1941.—041-231.

SAFETY MAGAZINES—UNDERWRITING EXPENSE

QUESTION: Has the Department of Public Safety authority to spend approximately \$500.00 to defray the initial cost of a publication to be issued monthly, which publication will serve as the official journal for the Department, carry its official minute records and executive orders rules and regulations, police articles on public safety education, activities of Highway Patrol officers, their arrests, etc., driver's license instructions as to issuance, revocation and suspensions, etc.?

To Hon. J. J. Gilliam, Director, Florida Highway Patrol:

Chapter 19551, Laws of Florida, Acts of 1939, created the Department of Public Safety. Section 2 of Article I of said laws, divides the Department of Public Safety into two divisions: (1) Division of the Florida Highway Patrol, and (2) Division of State Motor Vehicle Drivers' Licenses.

I have made a thorough examination of the law to determine whether you would have authority to join in such a publication, and I

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can find nowhere in the powers listed in Articles I and II, which contain the law for the Florida Highway Patrol, authority for you, as Director of the Florida Highway Patrol, to defray or underwrite a portion of the initial cost of such a publication.

Your letter states that there may be authority granted you, pursuant to Section 14 of said laws. This section is part of Article III and applies to the Division of Motor Vehicles. Section 14 relates to administration, and is as follows:

"Section 14. ADMINISTRATION.—The Department of Public Safety and its executive board which are otherwise created by this Act are hereby charged with the administrative function of enforcing the provisions of this Article. In addition to his duties now provided by law, the Motor Vehicle Commissioner of this State shall be, and he is hereby charged with the duty of serving as the Executive Officer of said Department of Public Safety insofar as the administration of this Article is concerned. He shall be subject to the supervision and direction of the Executive Board of said Department of Public Safety, but his official actions and decisions as such Executive Officer shall be conclusive unless the same are superseded or reversed by said Executive Board, or by a court of competent jurisdiction. The Executive Board shall make and adopt rules and regulations for the orderly administration of this Article."

While this section charges the Executive Board of the Department of Public Safety with the duty of enforcing the provisions of Article III, and permits the Executive Board to adopt rules and regulations for the orderly administration of same, nowhere in the fifty-one sections of this Article do I find, express or implied, power to participate in the publication of a monthly Safety Magazine.

I regret to advise that in my opinion you are not authorized to contract for the expenditure of approximately \$500.00 to defray the initial cost of a monthly Safety Magazine.

DRIVERS LICENSES

August 28, 1942.—042-426.

PAROLE COMMISSION—RESTORATION

QUESTION: What authority has the Florida Parole Commission in connection with cases where individuals holding automobile driver's licenses from other states and who have been found guilty in the Florida courts and their licenses taken from them and returned to the issuing states, and their Florida driving privileges revoked?

To Hon. Francis R. Bridges, Jr., Chairman, Florida Parole Commission:

The Public Safety Act provides that a non-resident's "privilege of driving a motor vehicle on the highways of this state" is subject to suspension or revocation (Section 322.23, Florida Statutes, 1941); whereas the Department of Public Safety has the power to revoke the "license" of a resident driver under prescribed circumstances. (Section 322.26, Florida Statutes, 1941.)

While Section 322.31, Florida Statutes, 1941, provides for an appeal to the Parole Commission only in cases where the "driver's license has been suspended, revoked or canceled under the provisions" of the Act, it is my opinion that this provision should be interpreted to allow both resident and non-resident operators who have been affected by the Act to appeal to the Parole Commission. Otherwise, the Act would be subject to attack upon the constitutional grounds that citizens of other

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states were being denied the privileges and immunities granted citizens of this state.

Accordingly, I must advise you that the Florida Parole Commission should entertain appeals from non-residents who have had their privilege of driving a motor vehicle on the highways of this state suspended or revoked. I note that you state it is the custom of the Department of Public Safety to take up non-resident drivers' licenses in certain cases, and to return them to the issuing state. There does not seem to be any authority in the Public Safety Act for such action.

DRIVERS LICENSES

September 8, 1941.—041-507.

SCHOOL BUS DRIVERS—RESTRICTIONS

QUESTION: Is a person eighteen and under twenty-one years of age permitted to operate a school bus for the purpose of transporting pupils to or from school under the provisions of Section 18, Chapter 20451, Acts of 1941?

*To Hon. Colin English, State Superintendent of Public Instruction:
Hon J. J. Gilliam, Department of Public Safety:*

Section 18, Chapter 20451, Acts of 1941, reads as follows:

"Section 18. Special Restrictions on Drivers of School Buses and Public or Common Carrier Motor Vehicles.

"(a) No person who is under the age of 21 years shall drive any motor vehicle while in use as a school bus for the transportation of pupils to or from school, nor any motor vehicle while in use as a public or common carrier of persons or property, and only in the event he has been licensed as a chauffeur and has received his special chauffeur's license.

"(b) No person shall be granted a special chauffeur's license unless he has had one year of driving experience prior to the issuance thereof, nor until he files with the Department a certificate showing his employment as such chauffeur and one or more certificates signed by a total of at least three (3) responsible people to whom he is well known, certifying as to his good character and habits.

"(c) No such license shall be granted until the Department is fully satisfied as to the applicant's competency and fitness to be so employed.

"(d) The Department may, in its discretion, impose such rules and regulations or the exercise of such special chauffeur's licenses as it may deem necessary for the safety and welfare of the traveling public."

This Section is identical with Section 18, Chapter 19551, Laws of Florida, Acts of 1939, except that the words "nor in either event until" appearing in sub-section (a) of the 1939 Act are changed to "and only in the event" in the 1941 Act.

On September 13, 1939, a former Attorney General construed Section 18, Chapter 19551, Acts of 1939, to mean that a person eighteen and under twenty-one years of age could be issued a chauffeur's license and a special chauffeur's license which would authorize him to drive and operate a school bus. I am informed that this construction was adopted by the Motor Vehicle Commissioner and that it has been the practice since September 1939 to permit persons under twenty-one years

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of age to drive school buses and to issue such persons chauffeur's licenses and special chauffeur's licenses for this purpose.

We must assume that the 1941 Legislature had knowledge of this construction and of the policy adopted by the Motor Vehicle Commissioner in administering the provisions of the 1939 Act. It must also be assumed that the Legislature, in changing the language of the statute, intended to accomplish some purpose and I think it apparent that this purpose was to void the construction placed upon the 1939 Act and to make it clear that no person under the age of twenty-one years should be permitted to drive a motor vehicle while in use as a school bus for the transportation of pupils to and from school or a motor vehicle while in use as a common carrier of persons or property.

Section 18 of the 1941 Act deals solely with drivers of motor vehicles used as school buses and as common carriers of persons and property. I believe the Legislature intended to place those drivers who are entrusted with the lives of school children and passengers on motor buses in a class by themselves and to require them to possess higher qualifications than those required of any other class of drivers.

Sub-section (a) of Section 18, Chapter 20451, provides that such driver shall have been licensed as a chauffeur and also received a special chauffeur's license. Sub-section (b) of this Section provides that no special chauffeur's license shall be granted unless the applicant has had one year of driving experience. The applicant must also file with the Department of Public Safety a certificate showing his good character and habits. These restrictions were intended to provide additional safeguards for school children and passengers in motor vehicles used as common carriers by requiring that such vehicles be operated only by persons who are experienced drivers at least twenty-one years of age and of good character and habits.

It is, therefore, my opinion that Section 18, Chapter 20451, Laws of Florida, Acts of 1941, prohibits persons under twenty-one years of age from driving and operating motor vehicles while in use as school buses for the transportation of pupils to and from school.

DRIVERS LICENSES

June 19, 1942.—042-307.

SCHOOL BUS DRIVERS—RESTRICTIONS

QUESTION: May a person under twenty-one years of age obtain a temporary special chauffeur's license to be used solely for relieving the shortage of persons eligible to obtain these licenses?

To Hon. J. J. Gilliam, Director, Florida Highway Patrol:

I presume you mean chauffeur's licenses authorizing persons under twenty-one (21) years of age to operate school buses and other motor vehicles used as common carriers of passengers.

I have given considerable thought to this question, and have further considered the provisions of Chapter 20451, Acts of 1941, and have reconsidered the opinion rendered by me on September 8, 1941 (041-507), wherein I interpreted this Act as prohibiting persons under twenty-one (21) years of age from driving and operating school buses while in use for the transportation of pupils to and from school, and other motor vehicles used as common carriers of passengers.

MOTOR VEHICLES—Drivers Licenses

I realize that large numbers of men twenty-one (21) years of age and over have recently been inducted into the military service of the country, and that it may well be extremely difficult at this time to obtain the services of persons twenty-one (21) years old to drive school buses and common carrier motor vehicles. However, the Legislature has seen fit, by the enactment of Chapter 20451, Acts of 1941, to definitely provide that no person under twenty-one (21) years of age shall be permitted to drive and operate motor vehicles of this class. The fact that the Act, in view of the emergency existing at this time, may work hardships in some quarters would not justify me in interpreting it in a manner clearly contrary to the expressed intent of the Legislature.

I therefore must adhere to my original opinion on this subject rendered on September 8, 1941.

AUTO TRANSPORTATION COMPANIES

April 7, 1941.—041-182.

MILEAGE TAX—DISPOSITION

QUESTION: The Board of Administration has on hand a balance of \$53.74 for the account of Liberty County, consisting of Auto Transportation Mileage Taxes collected pursuant to Chapter 14764, Acts of 1931. What disposition should the Board make of this money, as there is no bonded indebtedness of Liberty County under supervision of the Board of Administration, to which this money may be applied?

To Hon. J. Edwin Larson, State Treasurer as County Treasurer Ex-Officio:

Section 17 of Chapter 14764, Acts of 1931, known as the Auto Transportation Mileage Tax law, provides in part, after stipulating as to the disposition of the moneys collected under the Act, as follows:

"All remaining mileage taxes collected under this Act from for hire auto transportation companies holding permits from the Railroad Commission shall be disposed of as provided by law for disposition of motor vehicle auto license taxes. . . ."

Section 1304, Compiled General Laws of Florida, Permanent Supplement, Vol. I, page 554, provides in part, after certain allocations of license fund money have been made, as follows:

"All moneys paid into the State treasury under the provisions of law relative to the licensing of motor vehicles, . . . shall be apportioned and appropriated as follows:

"The entire proceeds shall be paid into the State treasury to the credit of the county school fund."

It is, therefore, my opinion that as Liberty County has no bonded indebtedness to which the \$53.74 may be applied, and as the Auto Transportation Mileage Tax law provides surplus money should be disposed of as provided by law for disposing of motor vehicle auto license tax funds, and as it is provided that license tax money is paid into the State treasury for the credit of the county school fund, the \$53.74 should be credited to the county school fund.

September 10, 1941.—041-512.

MILEAGE TAX—DISPOSITION

QUESTION: There being no bonded indebtedness of Liberty County under supervision of the Board of Administration, what disposition should

MOTOR VEHICLES—Auto Transportation Companies

the Board make of the Auto Transportation Mileage Tax which it now has on hand?

(Supplement to 041-182, April 7, 1941)

To Hon. J. Edwin Larson, State Treasurer as County Treasurer Ex-Officio:

Section 17 of Chapter 14764, Acts of 1931, which seems never to have been amended, as have many other sections of that Act, contains directions for the distribution *by the State Comptroller* of the funds commonly referred to as Auto Transportation Mileage Tax funds.

So much of such funds, less expenses of collection and 10% thereof payable to the Railroad Commission, as are derived from "For Hire Auto Transportation Companies holding permits from the Railroad Commission" are, *by the State Comptroller*, paid over to the State Treasurer for the credit of the "County School Fund," as indicated in my former opinion.

So much of such funds, with the deductions aforesaid, as are derived from "Auto Transportation Companies holding Certificates of Public Convenience and Necessity in common or private contract carriage" are, *by the State Comptroller*, remitted each quarter to the various municipalities and counties in the amounts and proportions named in the statute, that part going to the counties to be used *by the Board of County Commissioners* as the statute prescribes.

Nowhere in the Act mentioned is the reference made to the Board of Administration or to the State Treasurer in his capacity of County Treasurer Ex-Officio, or to any other method of distribution. Neither is there any other statute that I have discovered treating the subject matter.

In view of the fact, therefore, as stated by you, i.e., that Liberty County has no bonded debt under the supervision of the Board of Administration, and concluding from the circumstances that the funds in question were placed in the hands of the Board of Administration under a misapprehension by the Board of County Commissioners of Liberty County of their duty in the premises, I am of the opinion that all funds in your hands which may be identified as those derived from "Auto Transportation Companies holding Certificates of Public Convenience and Necessity in common or private contract carriage" should be remitted to the Board of County Commissioners of Liberty County, to be disposed of by that body as they may be advised is legal and proper, there being no statute imposing upon the Board of Administration or the State Treasurer the duty to supervise the handling of the same by the Board of County Commissioners.

CHAPTER XIX

HIGHWAYS, BRIDGES AND FERRIES

STATE ROADS

October 6, 1942.—042-476.

OVERSEAS HIGHWAY—FINANCING CONSTRUCTION

QUESTION: In order to cooperate in and facilitate the financing of the construction of the Overseas Highway between Florida City and Key West, which construction is to be financed under certain federal acts relating to rural post roads and the Defense Highway Act of 1941, the federal government paying 75% of the cost thereof and the State Road Department paying the remaining 25%, may the State Treasurer pursuant to requirements of the Federal Works Administrator, act as receiving and disbursing agent for said funds and pay the same out on vouchers approved solely by the State Road Department when the State Road Department releases the State Treasurer from any responsibility concerning the proper use and disposition of said funds when properly vouchered, said funds remaining federal funds in the hands of the State Treasurer and not to become State funds or be commingled with State funds?

To Hon. J. Edwin Larson, State Treasurer:

The Legislature of the State of Florida at its 1941 Session enacted Chapter 20325, assenting to and accepting the provisions of the Defense Highway Act of 1941 above referred to, and in and by said Act the Florida Legislature authorized the State Road Department to accept and receive grants of money appropriated under said Act of Congress and all amendments thereto, and use the same in accordance with the terms and conditions expressed in said Act of Congress and by the amendments thereto.

It is my opinion that the Legislature intended that the State of Florida and the various officers of the State should cooperate to their fullest extent in carrying out the provisions and intendments of the Defense Highway Act of 1941, in order that the State of Florida might receive and have all necessary defense highways for speeding up our country's war effort and assuring its success.

Inasmuch as the State Road Department has relieved you of any responsibility concerning the use of said funds when paid out on proper vouchers, it is my opinion that you may lawfully participate in this matter as anticipated by the documents attached to your request. It is further my opinion in view of the evident intent of the Legislature that the State of Florida should cooperate in every way possible in matters of this kind with the federal government, that you would be justified in agreeing to act as receiving and disbursing agent for these federal funds.

STATE ROADS

January 29, 1942.—042-52.

OVERSEAS HIGHWAY—OPENING EXPENSES

QUESTION: Under Chapter 21452, Special Acts of 1941, is it legal for the Overseas Road and Toll Bridge District to pay the sum of \$3000.00 to defray certain expenses incurred incident to the celebration held in 1938 signalling the opening of the Overseas Highway to traffic?

HIGHWAYS, BRIDGES AND FERRIES—State Roads

To Mr. B. M. Duncan, Manager, Overseas Road and Toll Bridge District, Marathon, Florida:

I have examined this Act, and its language is, in my opinion, sufficient to confer upon the District the authority to make this payment. It is assumed that the Act was properly passed by the Legislature and is in all respects constitutional. However, I have not considered these questions and therefore express no opinion on them.

STATE ROADS

December 2, 1942.—042-573.

**ROAD DEPARTMENT—AUTHORITY—STREET PAVING—
UNIVERSITY OF FLORIDA**

QUESTION: May the State Road Department legally perform certain work on the University of Florida campus, such work to consist of parkways and street paving?

To State Road Department:

I find no legislative authority for the State Road Department to perform this work since it is not authorized by special legislative act; nor would the proposed work form a part of the state highway system.

You have advised me that one and a quarter miles of roadway, which the State Road Department was authorized to construct on the University of Florida campus, by virtue of Chapter 15,068, Laws of Florida, Acts of 1931, has long since been constructed. Therefore, Chapter 15,068 is no authority for the performance of the proposed work.

I find no state statute, either general or special, which would expressly or impliedly authorize the State Road Department to perform this work.

STATE ROADS

March 3, 1941.—041-100.

**ROAD DEPARTMENT—PAYMENT DELINQUENT TAXES ON RIGHTS
OF WAY**

QUESTION: Is it the duty of the State Road Department to pay outstanding or delinquent drainage taxes on lands acquired by said department for rights of way for State Roads?

To Hon. Thomas A. Johnson, Chairman, State Road Department:

There is no statutory authority for such use of the funds administered by the State Road Department.

Chapter 15659 Acts of 1931, still in effect, levies a gasoline tax of six cents per gallon made up of two separate taxes, to-wit: First Gas Tax; tax of three cents per gallon for the use of the State Road Department, as provided by law; Second Gas tax: a tax of three cents a gallon to be appropriated as provided for in Section 8 of said Chapter 15659.

Section 3 of said Chapter provides that the First Gas Tax shall be paid into the State Road License Fund which fund is created in the same section.

HIGHWAYS, BRIDGES AND FERRIES—State Roads

Section 6 of the same Chapter provides that all moneys in the State Road Reserve *shall be used for the construction and maintenance of State roads.*

The only other funds allocated to the State Road Department are those derived from gasoline dealers' license tax after the costs of administering the act mentioned have been deducted and these are added to the State Road License Fund.

Payment of outstanding or delinquent drainage taxes on State Road rights-of-way is not a use for the "construction and maintenance of State roads" as I view the matter.

Therefore, I conclude that the State Road Department should not pay the taxes mentioned.

STATE ROAD DEPARTMENT

August 21, 1941.—041-468.

ROAD DEPARTMENT—ADVERTISING

QUESTION: Is the State Road Department authorized to expend funds to place a complimentary advertisement in a copy of the Florida Industrial Forum?

To State Road Department:

You do not have any authority to expend funds for advertising, as I can find no authority for such expenditures under our law.

STATE ROAD DEPARTMENT

June 19, 1942.—042-324.

**ROAD DEPARTMENT—PAYMENT—MEDICAL EXPENSES—
WORKMEN'S COMPENSATION ACT**

QUESTION: May the State Road Department legally expend more than \$1,000.00 for medical, surgical and other remedial treatment for an employee of the department who was injured as the result of an accident that arose out of and in the course of his employment?

To Hon. H. H. Baskin, Secretary, State Road Department:

Sub-section (3) of Section 2 of the Workmen's Compensation Act as amended by Chapter 20672, Laws of Florida, Acts of 1941, is as follows:

"(3) The term 'employer' means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person."

The State Road Department is a component part of the State Government, (State ex rel., Davis vs. Love, 126 So. 374), and is therefore an employer within the meaning of the Workmen's Compensation Act.

Section 13 of this Act, as amended by Chapter 18413, Acts of 1937, and Chapter 20672, Acts of 1941, is in part as follows:

"(a) The employer shall furnish such medical, surgical, and other attendance or remedial treatment under the direction and supervision of a qualified physician or surgeon, nurse and hospital service, medicine, crutches, artificial members, and apparatus for such period as the nature of injury or the process of recovery may require. If the employer fails

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to provide the same after request by the injured employee, such injured employee may do so at the expense of the employer, the reasonableness and the necessity to be approved by the Commission. The employee shall not be entitled to recover any amount expended by him for such treatment or service, unless he shall have requested the employer to furnish the same and the employer shall have failed, refused or neglected to do so, or unless the nature of the injury required such treatment, nursing and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide the same; nor shall any claim for medical, surgical or other remedial treatment be valid and enforceable against the employer unless within twenty days following the treatment the physician giving such treatment furnish to the employer and to the Commission a report of such injury and treatment on a form prescribed by the Commission.

"(b) The Industrial Commission may at any time, for good cause shown it, in its discretion order a change in such medical remedial attention.

"(c) All fees and other charges for such treatment or service shall be limited to such charges as prevail in the same community for similar treatment of injured persons of like standard of living, and shall be subject to regulations by the Commission, who SHALL adopt schedules of charges for such treatment or services, except that the total charge against the employer for such services and supplies shall not exceed the sum of \$1000.00."

Sub-section (c) of Section 13 clearly limits the extent of the legal liability of the employer to the sum of \$1000.00. There is therefore, in my opinion, no legal liability on the part of the State Road Department to the injured employee in excess of \$1000.00 for medical, surgical and other remedial treatment and supplies, under the provisions of the Workmen's Compensation Act.

The State Road Department of Florida was created for the primary purpose of building and maintaining public roads, highways and bridges, and it is given statutory authority to enter into contracts for the purpose of accomplishing these objectives. I am unable to find any law authorizing the Department to contract with physicians or others for furnishing medical treatment or supplies to an employee of the Department who has been injured in the course of his employment. In the absence of such authority the Department is not required or authorized to pay any claim for such treatment and supplies except as provided in the Florida Workmen's Compensation Act. Any such claim would be unenforceable, as a suit against the Department is in effect, a suit against the State and the State is immune from suit unless and until the Legislature makes provision by general law for bringing suit against the State.

The Legislature has, by Chapter 15022, Laws of Florida, Acts of 1931, made provision for and consented that suits in law and in equity may be brought against the State Road Department on claims under contract for "work done." In my opinion "work done" within the meaning of this Act refers only to work in connection with the construction and maintenance of highways, roads and bridges, or in connection with other activities that the State Road Department is by statute specifically, or by necessary implication, authorized to engage in.

It is therefore my opinion, that the State Road Department is without authority to obligate itself by contract or otherwise for the payment of any amount of money for medical, surgical or other remedial treatment and supplies for an employee of the Department who has been injured in an accident arising out of and in the course of his employment

HIGHWAYS BRIDGES AND FERRIES—State Road Department

with the Department, in excess of the sum of \$1000.00, which is the limit of its legal liability as fixed by Section 13 of the Workmen's Compensation Act, as amended by Chapter 20672, Laws of Florida, Acts of 1941.

STATE ROAD DEPARTMENT

May 18, 1942.—042-243.

ROAD DEPARTMENT—PURCHASE OF PROPERTY FOR GENERAL OFFICE BUILDING

QUESTION: The State Road Department desires to purchase the city block fronting on Adams Street immediately northwest of the State Capitol building for a site on which to build the department a headquarters office building which is needed because the present quarters of the department in the Martin Building are inadequate and outmoded and seriously handicap the department in the efficient accomplishment of its work in constructing and maintaining the State road system. Construction of the proposed new building may have to be postponed until building material priority regulations and other conditions caused by the war are out of the way, but it is considered advantageous that a building site be purchased at this time. Has the Road Department the authority to purchase the contemplated site for the purposes above set forth?

To State Road Department, Tallahassee, Florida:

A certain portion of the gasoline tax is set apart by statute to be used for the construction and maintenance of State roads under the direction of the State Road Department, which department may from time to time make requisition on the Comptroller for funds to pay for the construction and maintenance of State roads.

The State Road Department is charged with the construction, repair and maintenance of State highways, and by statute is specifically required to maintain its headquarters and general offices at the State Capitol, and until suitable and adequate space for such offices shall be provided in the State Capitol building or other building owned by the State, the State Road Department is authorized and empowered to rent or lease suitable office room for such headquarters in other buildings at the State Capital and pay the rental therefor from any funds provided for the maintenance of said department.

Section 1 of Chapter 17280, Acts of 1935, authorizes the State Road Department "to purchase, lease or otherwise acquire any land and to take deed thereto in the name of the State of Florida when such lands shall be necessary in connection with the layout, construction, repair or maintenance of any State highway or appurtenance thereof and any land or buildings or both necessary to the efficient accomplishment of the foregoing purposes."

Considering all of these statutes together, they very definitely contemplate proper and adequate office and administrative facilities for the proper operation of the State Road Department in order that it may efficiently accomplish the purposes for which it was created, that is, the laying out, construction, repair or maintenance of State highways.

The purchase of the building site and the construction of the present Chemistry Building afford some authority for the opinion I have reached here.

Section 10, Chapter 15615, Laws of Florida, Acts of 1931, being an amendment to the statute creating the general inspection fund, provides that all expenses incurred in the enforcement of the inspection acts, in-

HIGHWAYS BRIDGES AND FERRIES—State Road Department

cluding acquirement of equipment and other property, when approved by the Board of Commissioners of State Institutions as necessary to more economical and proper execution of the agricultural fertilizer analysis and general inspection laws, shall be paid from the general inspection fund.

Section 3821, Compiled General Laws, requires the Governor to provide a suitable laboratory for the State Chemist.

In the case of Mayo vs. Matthews, 150 So. 900, the Supreme Court held that the foregoing provisions were sufficient to authorize the purchase of land and construction thereof of the present Chemistry Building as necessary to more economical and prompt execution of the agricultural fertilizer analysis and general inspection laws.

It is, therefore, my opinion that the State Road Department, under the foregoing statutes and the opinion in the case of Mayo vs. Matthews, supra, has the authority to purchase property at the State Capital, to be used as a building site for the general offices and headquarters of the State Road Department, if, in the judgment of said State Road Department, the erection of such an office building is reasonably necessary for the proper operation of said State Road Department in the performance of the functions for which it was created. The purchase of such a building site, in my opinion, should be authorized by resolution, adopted by said State Road Department, reciting the advisability and necessity for the erection of its own office building, as well as the advisability of procuring the necessary building site at this time, although the actual construction of the office building may through necessity be postponed for the duration of the war.

The request for this opinion relates to the authority of the State Road Department to purchase the *block* fronting East on Adams Street, lying West of the Northern part of the State Capitol building. Whether or not the Department has need for the *entire block* as a building site is a matter to be determined by the department itself in the light of its needs and necessities, and its own knowledge thereof. Therefore, this opinion does not purport to pass upon that phase of this matter.

BOARD OF ADMINISTRATION

July 29, 1941.—041-431.

BAKER COUNTY SINKING FUNDS—INVESTMENT IN BONDS

QUESTION: The Board of Administration has been offered as an investment \$2,000.00 Baker County 5% Special Road and Bridge District No. 1 bonds at par plus interest at the contract rate to the date purchased. Is the Board of Administration authorized to purchase these bonds as an investment for any bond fund having available funds under the supervision of the Board of Administration?

To Board of Administration:

It is provided in Section 2 of Chapter 20302, Laws of Florida, Acts of 1941 in part as follows:

"The Board of Administration may invest any sinking funds to the credit of any county or special road and bridge district, or other special taxing district, in the hands of the State Treasurer as County Treasurer ex-officio, in any . . . bonds of any county or special road and bridge district in the State of Florida entitled to participate herein, whether matured or unmatured; provided, however, that as to matured

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bonds the value thereof as an investment shall be the price paid for such bonds, which shall in no event exceed the par value plus accrued interest. . . . Provided that such bonds so purchased shall not be cancelled but shall be held as an investment until the same are redeemed, sold or exchanged for refunding bonds as hereinafter provided."

The law appears to be clear that the Board of Administration would be authorized to purchase the Baker County Bonds paying therefor a price not exceeding the par value thereof plus interest to the date of purchase at the contract rate of 5%.

August 8, 1941.—041-441.

BAY COUNTY—REFUNDING CONTRACT—SULLIVAN, NELSON AND GOSS, INC.

QUESTION: Is the Board of Administration legally authorized and required to approve the refunding contract between Bay County and Sullivan, Nelson & Goss, Inc.?

To Board of Administration:

Chapter 15772, Laws of Florida, Acts of 1931, seems to cover the whole field of refunding operations by counties, of bonded debt, and in very plain language, found in Section 27 thereof, vests power exclusively in the several counties and districts. You are further advised, however, that under the provisions of the Acts of the Legislature of 1941, granting certain powers to the Board of Administration, with reference to funds credited to counties from gasoline taxes, there might well come a time when the Board of Administration would be in position to exercise wide authority, particularly in the matter of the exchange of original for refunding bonds.

June 24, 1942.—042-318.

BROWARD COUNTY—U. S. EX REL. VERMONT INVESTMENT CO. VS. BROWARD COUNTY—PAYMENT OF COUPONS

QUESTION: Is the Board of Administration legally authorized to pay out of applicable interest and sinking funds the coupons from the captioned county's bonds issued as of January 1, 1924 and July 1, 1925, upon certification that such coupons have not been paid or exchanged for refunding bonds, but are properly outstanding?

To Board of Administration:

Before making such payment, you should be satisfied:

(1) That the original bonds were duly certified to and have been recognized by your Board as entitled to participate in gasoline tax distribution under the provisions of Chapters 14486 and 15659, Acts of 1931.

(2) That neither these coupons nor the judgment (covering the coupons) are represented in any refunding issue now being administered by you.

(3) That these coupons are now actually outstanding and unpaid.

When the facts above outlined have been established to your satisfaction, payment out of any applicable funds would be in order to the

HIGHWAYS, BRIDGES AND FERRIES—Board of Administration**BOARD OF ADMINISTRATION**

extent of the face value of the coupons and upon their presentation and surrender to you.

October 12, 1942.—042-487.

To Board of Administration:

This will acknowledge receipt of yours of the 5th instant, reciting facts which developed since the above was written, to the effect that that the Board of County Commissioners made a tax levy pursuant to court order to raise funds to pay certain interest coupons on court house and road and bridge bonds which were merged in judgment—I assume that the judgment and order to levy were in the same case—and that the Board of County Commissioners made certain payments on the judgment out of the proceeds of such tax levy, but that no part of such proceeds were cleared through you.

You state further that the county now has the sum of \$2,661.12 to apply on the judgment, and request my opinion as to the proper procedure, you having sufficient available gasoline tax funds to pay the road and bridge coupons.

Assuming that the road and bridge bonds were entitled to participate in gasoline tax distribution, the measure of the obligation of the Board of Administration in the use of such funds was the face amount of the coupons from the road and bridge bonds, indicated in your original letter as \$7,955.00

The judgment being based upon both court house and road and bridge bonds, it is presumed that the levy ordered to be laid was of a millage sufficient to cover the aggregate amount of the judgment, without separation of the two items. Such being the case, it was the duty of the Board of County Commissioners to apply the proceeds of the levy through your Board, according to the statute. At any rate, it should have been applied to the road and bridge coupons in the proportion that their face value bore to the total amount of the judgment for which the levy was made. In other words, assuming from your original letter that the total judgment was for \$14,321.36, in the proportion that \$7,955.00 bears to \$14,321.36.

It follows, therefore, that a like proportion of the \$9,124.29 paid on the judgment should have been applied to the road and bridge coupons, and that the same course should be followed with regard to the cash balance of \$2,661.12 now on hand with the Board of County Commissioners.

The road and bridge coupons, being approximately one-half of the total amount of the judgment, the same proportion of \$11,785.41 (\$9,124.29 already paid, plus \$2,661.12 on hand with the Board of County Commissioners to be applied) should be treated by you as having been paid on the road and bridge coupons. The balance remaining unpaid after such treatment, may lawfully be paid by you out of gasoline tax or other funds in your hands and applicable, provided, however, that all future collections from the special levy be handled and accounted for as between the two accounts, the county's interest and sinking fund to receive the proportion as above outlined.

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BOARD OF ADMINISTRATION

December 18, 1942.—042-564.

To Board of Administration:

This will acknowledge receipt of yours of the 17th instant, as follows:

"Based on your opinion dated October 12, 1942, in the above styled case, it has been ascertained that of the total amount of \$7,955 of coupons from Broward County Highway Bonds involved in the captioned judgment, the Board of Administration appears to be liable for the sum of \$2,947.80.

"All of the interest coupons from the Highway Bonds have been presented with partial satisfaction of judgment, with the exception of \$300 of same due July 1, 1935, which appear to have been mislaid by the attorney for the Board of County Commissioners.

"Under the circumstances please advise whether or not the Board of Administration would be legally authorized to pay the satisfaction of the judgment in the amount of \$2,947.80, and what procedure you suggest in connection with the \$300 of misplaced coupons."

As advised in my opinion of October 12th last, the county should have remitted to you a proportionate share of the proceeds of ad valorem tax levies laid for road and bridge bonds entitled to participate in gasoline tax distribution. Instead, the county itself applied a disproportionate amount to the payment of other obligations, presumably expecting the Board of Administration to pay the road and bridge bonds out of gasoline tax funds, regardless of the purpose of the levy—a clear misuse of funds due, I am sure, to a misapprehension of duty and not to any deliberate design upon gasoline tax funds.

In my former opinion you were advised that the measure of your responsibility was the face value of the bonds and/or coupons, less the proceeds of the tax levy, which should have been remitted to you, but were not, as above stated.

Therefore, you are now advised that, in my opinion, you are authorized to apply gasoline tax funds toward the satisfaction of the judgment to the extent of your responsibility as stated in the preceding paragraph of this letter, taking as a consideration for your payment, an equivalent in bonds and/or coupons, together with satisfaction to that extent.

All other outstanding coupons, wherever they may be, are the obligations of the county, and may never become your obligation, because now past due, merged in judgment and cancelled, therefore non-negotiable, but withdrawn from the court files only for the purpose of complying with your requirement that obligations in such a status be actually presented to you before payment, according to their face value, will be made.

I suggest that the county be advised that you regard yourself under no legal obligation to pay the remainder of the judgment, and that your records be made to reflect this somewhat unusual situation for future guidance.

July 24, 1941.—041-399.

CALHOUN COUNTY—INTEREST AFTER MATURITY ON PAST DUE BONDS—PAYMENT

QUESTION: Would the Board of Administration be authorized to remit to the Florida National Bank of Jacksonville the sum of \$574.83

HIGHWAYS, BRIDGES AND FERRIES—Board of Administration**BOARD OF ADMINISTRATION**

representing interest after the maturity date of Calhoun County Road Bonds pursuant to the request of the Board of County Commissioners of Calhoun County?

To Board of Administration:

The Supreme Court of Florida in discussing the duty on the part of the Board of Administration to pay interest on the matured principal of defaulted bonds stated in the case of *State ex rel. Davis vs. Lee, et al.* 156 So. 744 as follows:

Text 745:

"The objection that there is no plain legal duty on the part of the state board of administration to pay interest on the matured principal of the defaulted bonds, that is to say, to pay interest on the principal of the bonds since September 1, 1933, we also sustain. Whatever may be the right of the bondholder to recover interest on his defaulted principal after maturity of the bond as a whole, a point we deem unnecessary to finally pass on in this case, it is certain that such right is not enforceable by mandamus, but must be enforced in a suit at law brought to recover an ordinary judgment therefor or as an incident to a judgment on the bond itself for the principal sum with interest on the debt after maturity to the date of judgment.

"Bonds are issued according to statutes which ordinarily contemplate no express promise to pay interest not contracted for in the bond itself."

It appears to be established that there is no plain legal duty on the part of the State Board of Administration to pay interest on county or district road or bridge bonds after maturity of the principal, where neither the bond itself nor the statute under which it was issued contemplates or requires the payment of any contract interest rate on the principal of the bond after maturity until such principal be paid. Whatever right to recover interest after maturity there is, must be founded on some implied liability that is incident to the existence of the matured and unsatisfied bond considered as a mere debt subject to the drawing of interest after maturity. But such a claim, if a claim there be, must be enforced in an action at law.

It is therefore my opinion that the Board of Administration would not be authorized to pay interest on the matured principal of the defaulted bonds.

September 30, 1941.—041-545.

CALHOUN COUNTY—INTEREST ON REFUNDING BONDS

QUESTION: Calhoun County on August 1, 1941, exchanged original 6% bonds for 5% refunding bonds dated August 1, 1939 with attached coupons maturing October 1, 1941 and subsequent interest dates. Some of the original 6% bonds matured prior to the date of exchange, but on the date of exchange the Board of Administration paid interest to that date. When the exchange was made, the holder of an unmatured original bond received a new bond with the coupons attached and paid the paying agent interest on the new bond from April 1, 1941 to August 1, 1941. The net amount of all this interest, \$933.33, was applied by the paying agent to interest after maturity on the original bonds. Would the Board of Ad-

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ministration be required to pay the full amount of interest coupons maturing October 1, 1941?

To Board of Administration:

The consideration paid by the holder of the original unmatured bond was the original bond upon which interest had been collected from the Board of Administration to August 1, 1941 (date of exchange), plus interest at 5% from April 1, 1941 (interest payment date), to August 1, 1941 (date of exchange)—thus taking a new obligation bearing interest at 5% from August 1, 1941. The paying agent used the interest payment so made to pay interest accrued after maturity on some of the original bonds.

In my opinion, the \$933.33 paid by the holder of the original bond, at the time of the exchange, represented in part the interest coupons maturing October 1, 1941, and should have been applied to meet the latter maturity for the period between April 1, 1941, to said maturity date, October 1, 1941. Therefore, it is my opinion that the Board of Administration is not authorized, and would not be required, to pay the full amount of the interest coupons maturing October 1, 1941, but only the face thereof, less the \$933.33 already in effect, paid thereon, and misapplied as above stated.

October 12, 1942.—042-486.

CALHOUN COUNTY—REFUNDING EXPENSES

QUESTION: The Board of Administration submitted (a) excerpts from the minutes of the Board of County Commissioners relating to the budget of the captioned county for the fiscal year ending September 30, 1941, and (b) certified copy of a resolution adopted October 5, 1942, purporting to clarify the first mentioned minute entry to make it appear that the 12 mill levy for the fiscal year ending September 30, 1941, was intended to cover an item of \$1,400.00 and the fees of the county's refunding agents incurred in the refunding process, and \$1,348.39 to pay interest at 6 per cent on the original bonds from their maturity date to the date of the completion of the refunding. After examination of the foregoing, would the Board of Administration be legally authorized to use interest and sinking fund moneys, consisting of ad valorem tax funds, and gasoline and auto transportation tax funds, all in a common sinking fund, as requested in Section 2 of the resolution of October 5, 1942?

To Board of Administration:

While the Board of County Commissioners had and has the power to levy a tax for either of the purposes above mentioned, I am of the opinion that since the budget for the year ending September 30, 1941, specified a levy of 12 mills for but two purposes, i.e., payment of interest and to create a sinking fund, the fund so raised may not be used for any other purpose.

Two fiscal years have elapsed between the effectiveness of the budget beginning October 1, 1940, and the so-called clarifying resolution of October 5, 1942, a date subsequent to the beginning of a third fiscal year. Ordinarily, and I think we may safely assume that, the actual proceeds of the levy for the fiscal year beginning October 1, 1940, have been consumed by your Board in meeting the county's obligations. Therefore, you probably have no such funds on hand at this time, and the use of funds raised by subsequent levies would be unauthorized unless the same were specifically for the desired purposes. Gasoline and auto transportation tax funds are not available for the purposes named.

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In addition to the fact that two fiscal years have elapsed since the effectiveness of the 12 mill levy and before the so-called clarifying resolution of October 5, 1942, it is to be noted that there has been a complete change in the personnel of the Board of County Commissioners.

I think it also in order to suggest that there is no ambiguity in the 12 mill levy entry as to its purposes. It is plain and unequivocal and not open to construction. To now change it is not to clarify, but to revise—a process which, in my opinion, is not authorized by the statutes governing the making up of budgets and the levy of taxes by boards of county commissioners.

August 26, 1941.—041-485.

CLAY COUNTY—PAYMENT OF ATTORNEY FEES

QUESTION: May the Board of Administration use the interest and sinking fund of Clay County Special Road and Bridge District No. 4 to pay bill of \$230.80 rendered by Hon. T. J. Jennings, Jr., County Judge of said County, such bill representing his fee for collecting \$4618.00 in taxes levied, in 1930, for said District?

To Board of Administration:

An independent investigation of the facts and circumstances surrounding this claim having been made by this office showing that the Board of County Commissioners of Clay County employed the claimant to represent it in the collection of said taxes, agreeing to pay him therefor a fee of 5 per cent of the amount collected, and the collection having been made in the year 1941, I am of the opinion that the Board of Administration is authorized to recognize and pay said claim out of the interest and sinking funds credited to said district, upon the theory that the collection was of long delinquent taxes, under a contract with the Board of County Commissioners, which fee should have been deducted from the amount remitted to the Board of Administration, and paid direct, by the County, to the attorney named. However, I am of the further opinion that an appropriate resolution of the Board of County Commissioners of Clay County, setting forth the facts and requesting the Board of Administration to pay said claim, should be adopted and filed with the Board of Administration, before payment is made.

July 9, 1942.—042-342.

DESOTO COUNTY—PAYMENT OF JUDGMENT

QUESTION: A judgment based upon interest coupons is held by A. B. Ottinger, against DeSoto County. Upon service of Rule to Show Cause issued out of the United States District Court on June 20, 1939, the Board of Administration impounded \$6,170.00 for the benefit of relator. DeSoto County is operating under the Kanner Act and there are not sufficient funds in the county's interest and sinking fund. May the Board of Administration pay all or any part of the judgment with available gasoline tax funds?

To Board of Administration:

I find in the files of the litigated case a letter to the former Assistant Attorney General Pallot from Mr. John H. Treadwell, Jr., dated August 4, 1941, stating that this judgment was purchased by a "cooperating account" in order that it could be placed in hands friendly to the objectives of the county in a refunding program, and that the funds theretofore impounded might be released. No later action is reflected in

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these files and I am assuming that the impounded funds were released and otherwise disbursed, since you state that you now have not sufficient funds available for payment. It is possible, also, that the judgment has been merged into the refunding issues mentioned by Mr. Treadwell.

Whatever the fact, however, this office has consistently held that gasoline tax funds are not available to pay any obligation except such as are represented by original or refunding bonds and coupons entitled to participate in gasoline tax fund distribution and according to the original undertaking. It is true, as Mr. Treadwell states in his letter to Governor Holland, of the 18th ultimo, that United States District Judge Barker has not agreed with this office in its interpretation of the law, which has been followed by your Board thus far, but the cases are being appealed for the purpose of obtaining a determinative pronouncement of the law. No appellate court, federal or state, has yet held as Judge Barker held, in a case in which the specific question was involved. We adhere to our original position, which, as we understand, has been adopted as the policy of the current administration.

July 28, 1941.—041-410.

ESCAMBIA COUNTY—PARTICIPATION OF COUNTY BONDS IN DISTRIBUTION PURSUANT TO BOARD OF ADMINISTRATION ACT

QUESTION: In view of Chapter 20648, Acts of 1941, is the Board of Administration authorized to include Escambia County 6% Lillian Bridge Bonds dated January 15, 1930, in the outstanding original indebtedness of Escambia County and permit it to participate in the benefits of Chapter 14486, Acts of 1929?

To Board of Administration:

Chapter 14486, Laws of Florida, Acts of 1929 which is commonly known as the Board of Administration Act provides in Section 19 in part as follows:

"No bond shall be permitted to participate in the distribution provided for herein except those bonds issued and outstanding on April 1, 1929."

Section 5 of this law makes it the duty of the clerk of the board of county commissioners to furnish a complete list of each and every issue of county bonds for road or bridge purposes and certain detailed information to be transmitted by said clerk to the Board of Administration.

Chapter 20648, Laws of Florida, Acts of 1941 provides in Section 1 as follows:

"That bonds entitled to participate in the benefits of and distribution provided for by Chapter 14486, Laws of Florida, Acts of 1929, shall include bonds, time warrants, notes and other forms of indebtedness issued for road purposes or for road and bridge purposes by any county or special road and bridge district of the State of Florida, actually issued, delivered, and outstanding on or prior to July 1, 1931, or bonds issued to refund the same; provided, however, that no bond shall be permitted to participate in the distribution provided for by said Act, except those bonds actually issued, delivered and outstanding on or prior to July 1, 1931, or bonds issued to refund the same; provided further, however, that any county bonds already voted and authorized pursuant to any written agreement between any county and the State Road Department, which was made prior to April 1, 1929, for the cooperative con-

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struction of any state road, although not sold or delivered, or bonds issued to refund the same, may participate in such distribution from the time the State Road Department received the said bonds, or the proceeds of the sale thereof, for the purposes of carrying out said agreement."

It appears that these bonds were not eligible to participate in the benefits of the Board of Administration Act because they were not issued, delivered and outstanding on April 1, 1929. However, Chapter 20648, Laws of Florida, Acts of 1941 was passed specifically to permit bonds in a relative position with the Lillian Bridge Bonds to participate in the distribution provided in the Board of Administration law when it was established that the bonds were actually issued, delivered and outstanding on or prior to July 1, 1931. The information contained in your letter does not disclose that such was the case. Therefore it is my opinion that before you would be authorized to permit these bonds to participate in the benefits allowed by Chapter 14486, Laws of Florida, Acts of 1929, you should ascertain and have definite proof that the bonds were issued, delivered and outstanding on or prior to July 1, 1931.

November 19, 1941.—041-410-1.

ESCAMBIA COUNTY—LILLIAN BRIDGE BONDS

Supplement to Opinion of July 28, 1941.

To Board of Administration:

After consideration of all the facts surrounding the bond issue involved, the controlling factors being that the bridge, to construct which the bonds were issued, is, so far as I have been able to determine, no part of the State road system, and that the bonds were not issued in pursuance of any written agreement between Escambia County and the State Road Department, entered into prior to April 1, 1929, for the cooperative construction of the bridge, I am of the opinion that the bonds in question are not entitled to participate in the benefits of and distribution of gasoline taxes administered by you.

As I understand, Lillian Bridge spans Perdido River, the middle of which is the western boundary of the State of Florida and of Escambia County; that it is a toll bridge constructed as such by Escambia County, but to become a free bridge if Baldwin County, Alabama, where the western end of the bridge rests, paid half of the costs thereof, which it was given an option to do, but has not done, and that Florida State Road 125 extends only to the bridge.

It may be that the bridge, or so much thereof as is in the County of Escambia, State of Florida, has been made a part of the Florida State system, but if so, I have been unable to find the statute. The State Road Department informs me that it has never taken over the bridge and has exercised no jurisdiction whatsoever over the same.

April 9, 1942.—042-163.

ESCAMBIA COUNTY—CANCELLATION OF INTEREST COUPONS

QUESTION: Is the Board of Administration, which holds as an asset of Escambia County certain Santa Rosa County Special Road and Bridge District No. 8 Time Warrants previously recognized as eligible for participation in gasoline tax distribution, authorized upon resolution of the Escambia County Commissioners to remove from said bonds and cancel all interest coupons, including those payable February 1, 1942, and deliver such cancelled coupons to the Board of County Commissioners of Santa Rosa County? The Pensacola Bridge Corporation, a private cor-

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poration, apparently holds \$50,000 of this issue and has agreed to waive all interest on its holdings of these Time Warrants accrued to August 1, 1941, and has delivered to the Board of County Commissioners of Santa Rosa County, for cancellation, the coupons representing such interest.

To Board of Administration:

That this original debt and liability for the payment thereof has been the subject of controversy between the two counties involved for a number of years, is a matter of common knowledge in legislative circles, and probably would never have been amicably settled if the Time Warrants had not been recognized as eligible for participation in gasoline tax distribution as a liability of Santa Rosa County Special Road and Bridge District No. 8, the issuing unit. We may safely assume, I think, that the willingness of these creditors to take the course indicated is prompted by a desire to adjust whatever differences remain.

Since, therefore, the effect of compliance with Escambia County's request will be to decrease the value of its holdings to the extent of the interest surrendered and to increase correspondingly Santa Rosa County's credits, nothing but a bookkeeping problem confronts your board, although, depending upon the status of the bonded debt of the respective counties, a surplus or an increase therein might accrue to Santa Rosa County, and no surplus, or a decrease therein to Escambia County, thereby affecting the funds available to the State Road Department for expenditures in the respective counties.

While I have assumed that the course taken by creditors and debtor is in furtherance of a compromise of differences, such assumption is not necessary, in my judgment, and does not control my views, for the reason that I know of no provision of law, or rule of court, prohibiting what amounts to a gift from one governmental subdivision to another, evidenced by a solemn resolution of the appropriate governing body making the gift. Certainly the donee county may not be heard to object.

My conclusion is that your Board is authorized to comply with the named resolution of the Board of County Commissioners of Escambia County by detaching from the \$45,000.00 Time Warrants of the issue involved, all interest coupons maturing February 1, 1942, and prior thereto, cancel and return the same to the Board of County Commissioners of Santa Rosa County.

August 20, 1941.—041-464.

GLADES COUNTY—BONDED DEBT

QUESTION: All of the bonds of Glades County, issue of August 1, 1923, have been paid and there remains a balance in the hands of the Board of Administration of \$809.74 in the interest and sinking fund account made up of ad valorem tax funds, auto transportation mileage tax funds, and funds received from Hendry County to pay the latter's proportion of the bonded indebtedness of Glades County; also there are other countywide road bonds of Glades County outstanding. Is the Board of Administration authorized to remit this excess amount, above mentioned, to the Board of County Commissioners, pursuant to Chapter 21259, Acts of 1941?

To Board of Administration:

Chapter 21259, Acts of 1941, not only authorizes, but requires, the Board of Administration to remit all funds on hand derived "from the collection of ad valorem taxes, or any other source, either current or de-

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linquent, levied or appropriated to pay any County Road or County Highway Bonds of Glades County, or judgments involving principal of or interest on such bonds . . . *where the indebtedness (represented by) of said bond issues or judgments involving same have been completely discharged.*" Italics supplied.

Therefore, if the conditions precedent, as named in the statute referred to, i.e., that all principal, interest and judgments involving the bond issue in question have been paid, it is the duty of the Board of Administration to remit the said excess as directed by Section 1 of said Chapter 21259.

June 10, 1941.—041-322.

**HARDEE COUNTY—PURCHASE OF CERTIFICATES OF DEPOSIT AS
AFFECTED BY BANKRUPTCY**

QUESTION: Is the Board of Administration legally authorized to use available interest and sinking funds of Hardee County in purchasing outstanding certificates of deposit at 85 per cent of their par value, which is the rate specified in the refunding plan, as confirmed by an interlocutory decree rendered in the bankruptcy proceedings of Hardee County? District No. 7 of Hardee County is not operating under the Kanner Act, and there are sufficient interest and sinking funds to the credit of District No. 7 of Hardee County, to purchase approximately \$11,000.00 worth of certificates of deposit which the Board has been requested to purchase by the Board of County Commissioners of Hardee County of May 5, 1941.

To Board of Administration:

On the 19th day of June, 1939, there was filed in the United States District Court for the Southern District of Florida, Tampa Division, same being suit No. 3101, a Petition of Special Road and Bridge District No. 7 in Hardee County, Florida, for the approval and confirmation of a plan for the composition of its debts. There was provided in Section 10 of said plan a proviso that certificates of deposit were to be issued, which certificates were to represent interest accruals on the original bonds to the date of the issuance of the refunding bonds, viz: January 1, 1938. These certificates of deposit were redeemable at 55 per cent of their face value plus accrued interest thereon to date of purchase, if the purchase was made during the second year after the exchange of the bonds. I am advised that this is the second year after the exchange of the bonds.

It was further provided in Section 10 of said plan that if the certificates of deposit were not purchased by the county in accordance with the provisions of the plan of composition, that it would be necessary that the District issue refunding bonds covering the full amount of the outstanding certificates of deposit.

Sub-section 17 of Section 2 of Chapter 20302, Laws of Florida, Acts of 1941, confers sufficient authority upon the Board of Administration to invest sinking funds to the credit of any county or special road and bridge district, to purchase bonds of any county or special road and bridge district of the State of Florida as an investment, if the Board of Administration deems it so advisable. This section, I believe, confers sufficient authority upon the Board of Administration to purchase certificates of deposit. It is, therefore, my opinion that the Board of Administration is legally authorized to use available interest and sinking funds of special road and bridge district No. 7 of Hardee County, in purchasing outstanding certificates of deposit at the rate specified in the refunding plan, viz:

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55 per cent of the face value plus accrued interest thereon to the date of the purchase.

October 16, 1941.—041-587.

**HERNANDO COUNTY—APPLICATION OF SINKING FUND TO
PAYMENT OF JUDGMENT**

QUESTION: The Board of Administration has been offered the unpaid balance of a certain judgment, based upon obligations of Hernando County under the Board's supervision, and \$6,737.50 of matured interest coupons of the same issue, at a price of 99.999 plus interest until paid, and the Board has on hand \$1,248.08 raised by special levy to apply on the judgment. Is the Board authorized to apply the \$1,248.08 toward a partial satisfaction of the judgment and to purchase the remainder thereof and the matured interest coupons out of funds to the credit of said county subject to disposition under the Kanner Act?

To Board of Administration:

In my opinion, you would be authorized to apply the proceeds of the special levy to a reduction of the judgment, and to purchase the matured interest coupons mentioned at the price named under the Kanner Act, although the price offered is hardly within the language of the statute as used in sub-section (d) of Section 14 of Chapter 14486, Acts of 1929, as amended by Chapter 15891, Acts of 1933, Chapter 19279, Acts of 1939, and Chapter 20302, Acts of 1941, but apparently permissible in view of sub-section (g) of said section, which vests authority in the Board of County Commissioners to impose restrictions, conditions and limitations as to price, class, series and issue.

I am of the opinion that you would not be authorized to pay the balance of the judgment in question under the provisions of said statute.

January 20, 1942.—042-30.

HERNANDO COUNTY—ORIGINAL BONDS—ISSUE OF 1925

QUESTION: May counties "hoard" gasoline tax money to use in picking up bargains in their own bonds and at the same time default on interest or principal due?

To Board of Administration:

Demand had been made for payment of interest coupons maturing March 1, 1933, and subsequently thereto, on bonds issued as of September 1, 1925, an original issue; Hernando County is operating under the Kanner Act; some of this original issue have been exchanged for refunding bonds; in the interest and sinking fund account of the county, applicable to refunding bonds, there is the sum of \$2,520.79, none of which is gasoline tax funds, and only a part of which is tax redemption money based upon ad valorem tax levies made some years ago, according to verbal advices, but which is not sufficient in amount to pay all matured outstanding original bonds and interest, but in the Kanner Act account there is \$63,244.19.

The Board of County Commissioners has not, for the current fiscal year, filed with the Board of Administration any resolution or other notice that gasoline tax funds in the control of the board and to the credit of the county, are to be used for the purchase of its bonds under sub-section (d) of the Kanner Bill as amended in 1941. Since the opinion of the Attorney General of June 23, 1939, the policy of the Board of

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Administration, in cases where funds available were insufficient in amount to pay both original and refunding interest coupons in full, has been to pay currently maturing refunding interest coupons and to set aside sufficient funds to pay interest coupons of the original issue at interest borne by the refunding bonds, but there have been instances in which, by court order, this last fund has been depleted.

My view of the powers and duties of Boards of County Commissioners in connection with the use of gasoline tax funds and their road and bridge bonded indebtedness, is somewhat at variance with the practice heretofore prevailing and the views expressed in the opinion referred to. In this I feel that I am supported by our Supreme Court decisions and a course of reasoning based upon the obvious purpose and intent of the statutes on the subject.

I am of the view that counties may in one respect, and only in one respect, dictate the use and disposition of gasoline tax funds placed to their credit with the Board of Administration, and that is that they may direct that all or any part thereof be used to purchase their own respective bonds at bargain prices. When that power is exercised, however, there rests upon the county a correlary and imperative duty to provide by ad valorem tax levy or other money-raising method to supply the necessary funds to meet the annual requirements of their bonded debt, provided, of course, there is a deficit after gasoline funds are used to buy bonds, and that this duty is a condition precedent to the exercise of the right to require such purchase. In other words, a county may not, by inaction, in remaining silent as to the use of its credits, permit its Kanner Bill funds to accumulate and be withheld from the primary use intended by law, i.e. the payment of bonds, or else actually purchase for retirement its own outstanding obligations, and at the same time fail or refuse to provide for the servicing of its bonds.

Furthermore, if the county exercises its right to direct the purchase of bonds, it must do so at such time and in such manner as will enable the Board of Administration to make its calculations and advise the Board of County Commissioners as to what may be required of the county by way of ad valorem tax levy, if any. In the absence of such timely and proper notice, the Board of Administration is not only privileged, but is required by law, to use the funds to meet debt requirements as they come due and in the order of their priority.

Such being my views, you are advised that if for the current fiscal year Hernando County has not, as above indicated, elected to devote gasoline tax funds to its credit to the purchase of its bonds, your duty is to transfer the funds, or so much thereof as may be necessary, to the interest and sinking fund account to be used to bring the county's debt to a current basis, and that interest on original and unrefunded bonds should be paid at the respective contract rates.

February 4, 1942.—042-60.

HERNANDO COUNTY—PAYMENT OF JUDGMENT

QUESTION: The owner of a judgment against Hernando County is willing to withdraw from the court files the interest coupons, representing a debt of Hernando County, for presentation to the Board of Administration for purchase under the Kanner Act, at 99.999. There are sufficient gasoline tax funds available to purchase these coupons and in addition, approximately the sum of \$170.00, the proceeds of a special tax levied for the specific purpose of paying the judgment. Does the Board have authority to use all of the special levy funds now on hand, first, in

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payment of accrued interest on the judgment, and the balance, supplemented by Kanner Act funds, for the purchase of the actual coupons?

To Board of Administration:

In view of the fact that the coupons involved represent a debt of the unit whose funds are proposed to be used, I am of the opinion, and you are so advised, that the Board of Administration has authority to apply so much of the \$170.00 above mentioned toward the payment of interest on the judgment and the balance, if any remains, for the purpose of paying the actual unpaid coupons, but only in response to a resolution of the Board of County Commissioners requesting such action.

As to the payment of actual coupons out of Kanner Bill funds, I am of the opinion, and you are so advised, in view of the recognized situation in Hernando County with reference to its Kanner Bill funds, that any gasoline tax funds credited to the county, whether the Kanner Bill account or interest and sinking fund account, are properly applicable to the retirement, as distinguished from the purchase, of these interest coupons.

July 13, 1942.—042-346.

HERNANDO COUNTY—PAYMENT OF JUDGMENT

QUESTION: A tax levy was made in Hernando County, pursuant to court order, to pay a certain judgment. The Judgment has been fully paid and satisfied, but the Board of Administration has remaining on hand the sum of \$6,083.07, as the proceeds of said levy. There is also a balance of approximately \$1,000.00 unpaid on a judgment obtained by George J. McVey against the county, for which a special levy was made and from the proceeds of which the Board of Administration now holds a balance of \$429.04.

(1) May the Board of Administration use the above mentioned \$429.04 and so much of the above mentioned \$6,083.07 as may be necessary to fully pay the said judgment, as requested by the Board of County Commissioners?

(2) May the funds mentioned be drawn upon to pay \$2,162.50 of matured interest coupons from a Hernando County Road Bond issue dated September 1, 1925?

To Board of Administration:

While the two amounts aggregating \$6,512.11, were produced by an ad valorem tax levy to pay certain obligations, one of which has been fully paid and satisfied and upon the other of which there is but a small balance unpaid, the original bonds were countywide and were supported by the unlimited taxing power of the county at large, and, therefore, a continuing obligation of the county whose full faith and credit were involved.

Upon the theory that public officials may voluntarily perform an act which they may be judicially coerced to perform, and although the applicable general rule of law is that tax funds raised for a specific purpose may not be diverted to any other purpose, since the excess funds held by you are no longer required for the specific purposes for which raised, but are county funds and, if not used, will lie idle and be of no benefit to anyone, I am of the opinion that the courts would, in an appropriate proceeding, direct their application to the payment of any of the county's obligations of a nature kindred to those for which originally raised.

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Such being my views, you are now advised that the resolution referred to relative to the McVey judgment may lawfully be complied with and the coupons from the September 1, 1925 bond issue, represented by Mr. Giles J. Patterson, may also be paid from such excess funds.

October 2, 1941.—041-556.

HIGHLANDS COUNTY—PAYMENT OF REFUNDING FEE

QUESTION: Is the Board of Administration authorized to pay R. E. Crummer & Company fee for refunding Highlands County bonds out of interest and sinking fund money composed of gasoline tax funds and ad valorem tax funds?

To Board of Administration:

Upon the assumption that there is no special statute on the subject and that the funds now in your hands other than gasoline tax funds; were levied and collected for the purpose of paying the principal and interest of bonds entitled to participate in the gasoline tax distribution, I am of the opinion that you are without authority to use any of such funds to pay the fee mentioned or to appropriate the same, or any part thereof, to any purpose other than the payment of interest and principal of bonds of the above description.

May 9, 1941.—041-246.

HILLSBOROUGH COUNTY—PURCHASE OF BONDS FOR INVESTMENT

QUESTION: The Board of County Commissioners of Hillsborough County by resolution has requested the Board of Administration to purchase for the Hard Surface Road Bonds Sinking Fund of said county, Highway Refunding Bonds and Special Road and Bridge District Refunding Bonds totaling \$238,000.00, which have been offered to them by the Board of Public Instruction of Hillsborough County, Florida, for \$180,000. This is an average price of \$75.63 of the face value of said bonds.

It appears from the resolution that the Board of Public Instruction of Hillsborough County is in immediate need of cash in order to complete a full nine months school term; that they acquired these bonds pursuant to Section 7, Chapter 16,252, Laws of Florida, Acts of 1933, which permitted any person entitled to and desiring to redeem his lands from tax sales certificates or other evidence of taxing liens, to deliver, in payment thereof, bonds or matured interest coupons of such county or other taxing district in an amount equal to that portion of the tax sales certificates and subsequent unpaid taxes. The bonds or matured interest coupons received in redemption of such lands, were to be retained in lieu of cash. It further appears that Hillsborough County has in the Interest and Sinking Fund account an amount in excess of the \$180,000.00 which would be required for the purchase of said certificates.

(1) Is the Board of Administration authorized to purchase said bonds?

(2) Is the Board of Public Instruction authorized to sell said bonds?

To Board of Administration:

(1) Section 17 of Chapter 14486, Laws of Florida, Acts of 1929, provides in part as follows:

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"... The Board of Administration may invest any funds to the credit of any County or Special Road and Bridge District in the hands of the State Treasurer as County Treasurer Ex-Officio, by and with the consent and approval of the Board of County Commissioners or other governing body of such County or Special Road and Bridge Districts, in any bonds or treasury certificates of the United States or bonds of any County or Special Road and Bridge District in the State of Florida entitled to participate herein."

This provision of law authorizes the Board of Administration to make such an investment upon request of any Board of County Commissioners.

(2) House Bill No. 779 is an Act authorizing any Board of Public Instruction of any county of the State of Florida having a population of not less than 100,000 and not more than 200,000, according to the last Federal Census, to sell at public or private sale, any or all bonds and coupons in the possession of said Board. This Act was passed by the House of Representatives on May 2, by the Senate on May 5, and signed by the Governor on May 8. The Act provides that it shall take effect immediately upon its passage and approval by the Governor. Hillsborough County has a population of 180,148 and comes within the provisions of this Act. Section 1 of said Act provides as follows:

"Any Board of Public Instruction of any County of the State of Florida, having a population of not less than 100,000 and not more than 200,000, according to the last Federal Census, to which there shall have heretofore been allotted and which heretofore shall have received bonds and coupons as the share or interest of the school funds of such County in bonds and coupons theretofore received in payment of delinquent taxes and tax adjustments accepted pursuant to the provisions of Chapter 16,252, Laws of Florida, Acts of 1933, as amended by Chapter 17,400, Laws of Florida, Acts of 1935, shall be and is hereby authorized to sell all or any part of such bonds and coupons so received which have not heretofore been sold, exchanged or disposed of, at public or private sale as said Board of Public Instruction in its discretion shall deem advantageous, and in case of public sale pursuant to such advertisement as said Board of Public Instruction shall determine proper and direct to be given."

Section 4 provides in part as follows:

"In case of the sale by the Board of Public Instruction of any County of the State of Florida, of any bonds and coupons as authorized by the provisions of this Act, . . . by and with the consent and approval of the Trustees of such District, may be used and applied by the Board of Public Instruction of such County to provide the cost of extending the maintenance and operation of the current school term for a period not to exceed nine months without any amendment of the budget of such Board for the current school year to provide therefor, and without obtaining any other consent thereto."

This law expressly authorizes the Board of Public Instruction to sell any bonds or coupons in their possession, which in their discretion they shall deem advantageous, at either public or private sale. It appears from the resolution that the purpose of the sale is to provide a full nine months school term. This purpose is one which is authorized by House Bill No. 779.

Therefore, the Board of Public Instruction is authorized, pursuant to law, to dispose of the Countywide and Special Road and Bridge District Refunding Bonds in their possession, for the sum of \$180,000.00 if in their discretion they shall deem it advantageous, and the Board of Administra-

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tion is authorized, pursuant to law, to purchase said bonds as recommended by the resolution of the Board of County Commissioners of Hillsborough County, as an investment for Hillsborough County.

June 27, 1942.—042-322.

**HILLSBOROUGH COUNTY—STATE, EX REL. MEREDITH, ET AL VS.
HILLSBOROUGH COUNTY—TRANSFER OF FUNDS**

QUESTION: Pursuant to the commands of the peremptory writ in the above mandamus proceeding, the county levied a tax for the sole and exclusive benefit of the holders of refunding bonds of certain districts, one of which was Northeast Tampa Special Road and Bridge District No. 6, and there are considerable funds in the hands of the Board of Administration raised by such levy.

All the refunding bonds of three of the districts have been redeemed by still another refunding issue, but there are still outstanding some of the bonds of the Northeast Tampa Special Road and Bridge District No. 6, dated July 1, 1938.

Has the Board authority to transfer funds now on hand derived from the special levy mentioned and future receipts therefrom, to the interest and sinking funds of the respective districts?

To Board of Administration:

Since the funds proposed to be transferred were produced pursuant to the peremptory writ and while it was in full force, the only legal effect of the order of June 20, 1942, dismissing and dissolving the writ, was to relieve the county from any further levy thereunder. It did not purport to undo what had been done thereunder, even assuming that it would have been competent for the court to do so, and that the potential claims of others than the relators who may have acquired rights thereunder could have been disposed of in such a manner. Funds already collected, and those which may be included in tax sale certificates based upon such levy and those which may hereafter be collected, are committed to a specific purpose, and may be used for that purpose only, to-wit: the retirement of refunding bonds of the issues covered by the writ, or bonds to refund the same.

The writ shows that the tax to be levied in Northeast Tampa Special Road and Bridge District No. 6 was for the payment of an issue dated July 1, 1938, refunding a like amount of bonds of a previous issue, the date of which is not shown.

Therefore, it is my opinion that the funds now on hand, produced by said special levy, and such funds as may hereafter be collected through redemption of tax sale certificates based upon such levy, should be distributed among the sinking funds of the several districts involved in proper proportions.

While your inquiry raises no question as to how you should disburse such funds, in view of the fact that this particular district's debt may be covered by a new refunding issue, as are the other districts you mention, I take the liberty of suggesting that before distributing any funds in payment of the refunding issue of Northeast Tampa Special Road and Bridge District No. 6, dated July 1, 1938, you make sure that the same are not represented also by still another or new refunding issue.

I am of the further opinion that the funds so distributed may be used to pay the new refunding bonds, since the latter are but extensions or renewals of the debt about which the levy was ordered.

HIGHWAYS, BRIDGES AND FERRIES—Board of Administration**BOARD OF ADMINISTRATION**

July 1, 1941.—041-356.

HILLSBOROUGH COUNTY—EXCHANGE OF REFUNDING BONDS

QUESTION: Would the Board of Administration be legally authorized to exchange unmatured refunding bonds of one district for unmatured second refunding bonds of a different district, all in Hillsborough County?

To Board of Administration:

I have been unable to find any statutory authority authorizing the Board of Administration to exchange bonds from one district for bonds of another district, all in the same county, except that refunding bonds may be exchanged for original bonds of the same district, pursuant to the provisions of Chapter 17728, Laws of Florida, Acts of 1937.

Chapter 20302, Laws of Florida, Acts of 1941, provides that the Board of Administration may invest sinking funds to the credit of any county or Special Road and Bridge District, where the funds for such districts or counties are handled by the State Treasurer, as ex-officio County Treasurer. This statute permits an investment of funds, and not an exchange of bonds. The Board of Administration is a statutory trustee, and has only such powers as are expressed in the statute. The power to purchase, by making an investment, does not include the power to exchange.

It is, therefore, my opinion that the Board of Administration would not be legally authorized to exchange unmatured District refunding bonds of Hillsborough County for second refunding bonds of a different district in Hillsborough County.

December 18, 1941.—041-689.

HILLSBOROUGH COUNTY—PURCHASE OF BONDS

QUESTION: Hillsborough County paved a number of roads under authority of Chapter 9316, Acts of 1923. This Act was later declared unconstitutional, and after many years of litigation, the Supreme Court held Hillsborough County liable upon a quantum meruit basis for the labor and materials used upon the roads. Following final decision the county worked out settlements with the holders of the obligations. A suit was brought to validate bonds to be issued by the county in settlement of these obligations, and the Supreme Court declared the bonds were an obligation as of the date the roads were paved, and that no election was necessary by the people to issue the bonds. The present inquiry involves judgments against the county covering the above paving, aggregating \$198,000.00. The county has an opportunity to settle these judgments for \$99,000.00 but must settle in cash as bonds cannot be used. These bonds are in process of being validated, and a call has been advertised, returnable the latter part of December, 1941. Because of the state of war existing the Board of County Commissioners are somewhat apprehensive that bids may not be received for par or better from private buyers. In order to avoid losing the opportunity of the saving which is available under the present settlement, Hillsborough County is anxious to have assurance from the Board of Administration that it will purchase these \$99,000.00 in bonds at par, if no higher bid is received from private buyers. The County now has cash on hand to its credit in the Hard Surface Road Bonds Sinking Fund in an amount approximating \$125,000.00, which will not be needed until October 1, 1943. Is the Board of Administration authorized to purchase the \$99,000.00 bonds?

To Board of Administration:

This particular bond issue being a part of the issue in connection with which a previous opinion of this office has been rendered, to the

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effect that they were entitled to participate in the distribution of gasoline tax funds, according to my understanding, it is my opinion that there is no authority in the Board of Administration to purchase bonds at original sale or to enter into competition with public in bidding for same. If funds on hand to credit of issuing unit available to retire debt represented by proposed issue, the proper course would be to apply the same to retirement and reduce bond issue to that extent—in this instance, not in payment of judgment as such, but making use of available funds to lessen debt, which bonds are to retire, payment and satisfaction in full of judgment for much larger amount being merely an incidental circumstance.

I assume that the county does not intend to issue bonds for the difference between this settlement and the aggregate amount of the judgments mentioned, to-wit: \$198,000.00, but that the \$99,000.00 will be sufficient, and will be used to fully satisfy said judgments.

If the issuing unit is without sufficient funds to make the payment suggested, then the Board of Administration would have authority to invest sinking funds of any other county or special road and bridge district therein, under the provisions of Section 17 of Chapter 14486, Acts of 1929, as amended by Section 2 of Chapter 20302, Acts of 1941. Therefore, I see no legal objection to the Board of Administration assuring the Hillsborough County authorities that it is willing to make the investment last above suggested.

June 29, 1942.—042-326.

**HILLSBOROUGH COUNTY—PAYMENT OF "ADJUSTMENT
BALANCES"**

QUESTION: By resolution dated May 29, 1942, the Hillsborough County Commissioners request payment of various credit balances due the First National Bank of Chicago, since the 1938 refunding program has been completed. The aforesaid bank also holds \$3,868.75 par value of interest coupons from various issues which are to be cancelled upon payment of \$1,352.82. May the Board of Administration make the requested payment?

To Board of Administration:

This request involves the same principles as were involved in my opinion of the 27th instant, (042-325) under the subject,

"Indian River County—Special R&B District No. 4—Wabasso Bridge District—Cancellation of Bonds Unexchanged for Refunding Bonds",

except that in the instant case, from the copies of certificates of exchange, it appears clearly that the balances claimed by the bank include not only interest upon past due interest, but interest on principal after maturity the Board of Administration has not been finally determined to be liable to pay out of gasoline tax funds.

My opinion, therefore, is to the same effect as that of the 27th instant, in reference to the quoted subject matter, with the qualification, applicable to both cases, that your Board may with legal propriety regard the requested payments as representing contributions to the refunding program for which will be received and cancelled actual outstanding coupons of a face value in excess of the payments and for which no refunding bonds are now outstanding.

Neither this opinion nor that of the 27th instant referred to is applicable to ad valorem tax funds which may be on hand, available and payable upon proper resolution of the Board of County Commissioners.

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September 18, 1942.—042-440.

**HILLSBOROUGH COUNTY—PAYMENT OF PAYING AGENT'S
CHARGES FROM INTEREST AND SINKING FUND**

QUESTION: Is the Board of Administration authorized to use interest and sinking funds to pay bill of Manufacturers Trust Company in connection with bond refunding program of Hillsborough County?

To Board of Administration:

This will acknowledge receipt of yours of the 15th instant, in which you state that you are in receipt of a bill of Manufacturers Trust Company, paying agent, for paying charges in connection with bonds of several districts in Hillsborough County called for payment, all the funds for payment having been furnished by the county.

You attach to your letter certified copy of contract between the county and its fiscal agent and request my opinion as to whether or not you are authorized to use interest and sinking fund of the respective districts in payment of said bill.

Since the Board of Administration appears not to have furnished any funds to complete the program, or to have participated to any extent in the transactions thereunder, I am of the opinion that you are not authorized to use interest and sinking funds to pay the bill mentioned.

November 12, 1941.—041-639.

**HILLSBOROUGH COUNTY—PARTICIPATION OF REFUNDING
BONDS IN DISTRIBUTION OF GASOLINE TAXES**

QUESTION: Refunding bonds in the sum of \$173,750.00 were issued by Hillsborough County to pay certain judgments rendered against said County on July 18, 1941, based upon what was found to be an implied contract to pay for certain work done and materials furnished the County in the construction or improvement of certain roads therein. Is the Board of Administration authorized to include these refunding bonds in the indebtedness of Hillsborough County supervised by the Board, in order that they may participate in the benefit and distribution of gasoline taxes under the provisions of Chapter 14486, Acts of 1929, and Chapter 20648, Acts of 1941?

To Board of Administration:

The question as to whether or not these bonds are valid obligations as refunding bonds issued without an affirmative vote of the freeholders, has been set at rest by the decision of our Supreme Court, in the case of the State vs. Hillsborough County, in which the opinion was filed September 19, 1941. They were validated upon the theory that they did not create a new debt, but operated to change the terms of payment of an obligation created prior to the time when the affirmative vote of the freeholders became a part of our Constitution, as a prerequisite to the issuance of bonds by any taxing subdivision, the original basis being the implied obligation above mentioned.

The Court having held in the cited case that the *time* of the creation of the original debt was the controlling factor insofar as the power to issue refunding bonds without an approving vote of the freeholders was concerned, the logic of the situation would seem to be that the same result would follow as to the *nature* of the original debt, giving full effect to the implications of the rule enunciated in the following statement:

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"We have held that the provisions of amendment to Section 6, Article IX of the Constitution should not be given such a narrow and technical construction as would defeat its evident intent and purpose; nor should its expressed prohibition be impaired or frittered away by any such method of construction."

If the fundamental law of this State is thus susceptible, the same reasoning ought to apply to a statute such as Chapter 20648, Acts of 1941, which, although naming certain accepted forms of evidence of debt, may easily be held to include implied obligations incurred for the construction or improvement of public roads.

Therefore, the refunding bonds in question are entitled to participate in the benefit and distribution of gasoline taxes under the statutes named; provided, however, that the roads for the construction or improvement of which the original debt was incurred, have become State roads, a fact, so far as the record before me shows, yet to be ascertained—this because, as the Court held in the cited case, the purpose for which the original debt was created was a County purpose, and because it may become a State, or dualistic County and State purpose, only by virtue of the incorporation into the State system of roads, of the roads so constructed or improved.

December 19, 1942.—042-566.

HILLSBOROUGH COUNTY—INVESTMENT OF BONDS

QUESTION: The Board of Administration has arranged for the payment of all of the interest coupons due January 1, 1943, from the various issues of Hillsborough County Bonds, and the County has made a contract to handle the refunding of all of the bonds due January 1, 1943, but is unable to obtain the approving opinion in time to start the refunding so as to prevent principal defaults on that date. A letter from Honorable Luther W. Cobbey, Attorney for the Hillsborough County Commissioners, dated December 16, 1942, requests the assistance of the Board of Administration in preventing a default and at the same time preserving the right to refund at a later date.

Realizing that arrangements will have to be made promptly in order to prevent defaults, would the Board of Administration be legally authorized to use bond funds of other subdivisions of Hillsborough County under the supervision of this Board, in purchasing the bonds of the several taxing units on or before their due date, January 1, 1943, at par, as an investment, and to hold them until such time as the Board of County Commissioners completes the refunding program. If so, would the taxing unit whose funds are invested be permitted to draw 3% interest per annum on the amount invested, chargeable against the unit which issued the bonds?

To Board of Administration:

In my opinion, Chapter 20946, Acts of 1941, is authority for the State Board of Administration to make the investment outlined, whether as a statutory or constitutional body, the investment to bear interest at 3% chargeable against the unit issuing the bonds.

My opinion is based upon the theory that the State Board of Administration, as a statutory body, was vested with this authority by the chapter named, and, as a constitutional body, continues to possess such authority, and such additional power and authority as may be vested by Section 16 of Article IX of the Constitution.

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April 23, 1942.—042-202.

**HOLMES COUNTY—REFUNDING OF BONDS HELD FOR
INVESTMENT**

QUESTION: The Board of Administration holds for investment for Holmes County Special Road and Bridge Districts 1 and 2, \$8,000.00 of bonds of Holmes County Special Tax School District No. 10, now in default, and which are proposed to be refunded as per agreement between the Board of County Commissioners and the County Board of Public Instruction. Is the Board authorized to enter into such an agreement?

To Board of Administration:

From your records, not mentioned in this request, it appears that \$6,000.00 of these bonds were transferred to your Board by the Board of County Commissioners under the provisions of Chapter 14486, Acts of 1929, creating the Board of Administration and prescribing its powers and duties, and that the remaining \$2,000.00 were purchased by the Board of Administration early in 1930, about the time it began to function. This purchase was without authority in law, but was no doubt made in good faith before the powers and duties of the purchasing board had been clearly defined or understood, the earliest authority for investments by the Board of Administration being the Kanner Act of 1933, which amended Section 17 of the original Chapter 14486 in that respect.

Chapter 17728, Acts of 1937, authorizes the Board of Administration, by and with the consent of the governing body of the unit whose investments are sought to be involved, to accept refunding bonds in exchange for and in lieu of any investments held in the interest and sinking fund accounts of any taxing units whose interest and sinking funds are administered by the Board of Administration.

Although \$2,000.00 of the total amount here involved was acquired without authority in law, it still, in my opinion, constitutes a trust fund which your Board is under obligation to conserve and administer in the interests of the unit whose funds are involved, and must be treated as other investments made in strict compliance with law.

Chapter 17728, supra, when mentioning refunding bonds, is presumed to have contemplated refunding bonds issued under the 1931 refunding Act, because there was not in 1937, nor is there now, any other statutory method for refunding bonded debts of governmental subdivisions.

The accepted practice has been to refund such obligations by spreading the payment of the principal debt over a longer period and reducing the rate of interest from that originally contracted for. The proposal now before your Board is but an informal and less expensive refunding operation by which there is no reduction of the original debt, but a bringing of the debt to a current basis as of March 1, 1942, spreading payments of the principal over a longer period and reducing the rate of interest by 2%.

I am of the opinion that this program is in order and that the Board of Administration would be entirely within the law in granting such approval, or withholding approval, in its discretion.

June 27, 1942.—042-321.

**INDIAN RIVER COUNTY—BONDS ACCEPTED UNDER THE FUTCH
ACT**

QUESTION: Indian River County holds \$7,000.00 matured bonds of St. Lucie County (now Indian River County) Special Road and Bridge

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District No. 1, participating in gasoline tax distribution, acquired by the county under the Futch Act. Would the Board of Administration be legally authorized to pay the bonds so held out of available interest and sinking funds?

To Board of Administration:

In my opinion you are authorized to pay the bonds just as if they were in the hands of a private individual.

January 27, 1942.—042-43.

**INDIAN RIVER AND OSCEOLA COUNTIES—ATLANTIC-GULF
SPECIAL ROAD AND BRIDGE DISTRICT—PROPORTIONATE
DEBT**

QUESTION: How shall the indebtedness of the Atlantic-Gulf Special Road and Bridge District be apportioned between Indian River and Osceola Counties, there having been no legislative enactment fixing such proportions and no agreement between the counties as to the same?

To Board of Administration:

Since Chapter 14486, Acts of 1929, provided that all bonds issued by any county or special road and bridge district and outstanding on April 1, 1929, should be administered by the Board of Administration as participants in the benefits of the said Act, as originally enacted and as subsequently amended, and that "if any special road and bridge district shall contain lands in more than one county, the amount of the bonded indebtedness . . . shall be . . . apportioned between or among such counties in the proportion that the assessed valuation of the area of each county included within such . . . district shall bear to the total assessed valuation of such . . . district," I am of the opinion that the debt in the instant case should be apportioned between the two counties upon conditions as they existed at the time Chapter 14486 became a law.

That is, that the assessed valuations of 1929 should be used as the permanent basis for determining the indebtedness chargeable to each county and, consequently, the basis of credits to each, insofar as the participating bonds of the district are concerned.

Any other construction of the law, or course of action, would produce considerable confusion in accounting and would but emphasize the inconsistency between the distribution of second gasoline tax funds upon the basis of proportionate assessed valuations on the one hand and as provided in the statute above partially quoted, and upon the basis of population, area and contribution on the other hand.

You are, therefore, advised that the bonded indebtedness of the captioned district should be apportioned between the respective counties upon the basis set forth in the quoted statute (unnumbered paragraph 3 of Section 13 of Chapter 14486, Acts of 1929) as of the year 1929, and that such should remain the permanent basis of apportionment.

June 27, 1942.—042-325.

**INDIAN RIVER COUNTY—CANCELLATION OF BONDS UNEX-
CHANGED FOR REFUNDING BONDS**

QUESTION: The First National Bank of Chicago holds \$31,000.00 of unexchanged bonds of Indian River County Special Road and Bridge District No. 4, dated January 1, 1937, and of Wabasso Bridge District, dated January 1, 1938, showing the allocation thereof between the two

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districts; all of these outstanding bonds were called for redemption as of January 1, 1942; new issues have been sold for that purpose, and the Board of Administration is desirous of obtaining cancellation of such bonds as have not been exchanged from the first refunding issues. A statement of the Clerk of the Board of County Commissioners of Indian River County is to the effect that before cancellation may be obtained, provision must be made to settle unadjusted interest credits due the exchange agent, representing deposited interest accruals from original bonds in amounts less than \$1,000.00, the denominations in which the refunding bonds were to be delivered, the face amount of the coupons held by the exchange agent being \$1,920.00, upon which there is due a balance of \$1,540.00. Is the Board of Administration authorized to pay and retire these interest coupons for the balance due thereon, to-wit: \$1,540, there being no question in its mind as to its authority to pay the principal of the bonds in the sum of \$31,000?

To Board of Administration:

I understand the facts to be that in its capacity as exchange agent, the bank advanced its own funds to complete the refunding program to the extent of \$1,540.00, and has retained as security therefor interest coupons whose face value is \$1,920.00, the discrepancy being due to the fact that the bonds were issued in denominations of \$1,000.00, but that the original debts, principal and accrued interest, were not in an exactly equivalent amount, which necessitated an adjustment such as is indicated.

Such being my understanding, I am of the opinion that payment of the balance due the exchange agent for adjusting advancements, as indicated, is in order, provided the \$1,540.00 to be paid does not include any illegal item such as interest upon past due interest or upon principal after maturity.

May 15, 1941.—041-260.

LAKE COUNTY—PAYMENT OF JUDGMENT FROM SPECIAL LEVY

QUESTION: The Board of County Commissioners of Lake County levied a special tax for the purpose of paying Lake County Special Road and Bridge Districts No. 9 and 10 bonds. A special levy for the payment of these bonds was directed by the issuance of a peremptory writ of mandamus out of the Lake County Circuit Court, dated December 14, 1936, in the case of Klemm, et al, vs. Lake County. These bonds have been reduced to judgment and partial payments made on account thereof and at the present time there remains an unpaid balance against District No. 9 bonds in the sum of \$2,194.45, and against District No. 10 bonds in the sum of \$3,107.64, and there is now on hand derived from the special levy for District No. 9 bonds the sum of \$367.77 and for District No. 10 bonds the sum of \$117.23. Is the Board of Administration authorized to use these amounts and future receipts from the same source in payment of these two judgments?

To Board of Administration:

It appears to me that the rights of the judgment creditor against Lake County on its bonds have been fixed by the rendition of the judgments. Taxing units having the power to levy taxes may levy a special tax for the purpose of paying a judgment involving bonds to the county. A special levy was made for the purpose of paying the judgments involved herein. Counties have a right to tax the identical sources from which are to come the funds to discharge the bonded debt, for the purpose of paying a judgment involving its bonds. If the money raised from the special levy is insufficient to satisfy the entire judgment, then the

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Board of Administration would be authorized to apply the funds on hand, and future collections, in partial satisfaction of such judgments. It is my opinion that the proceeds of the special levy funds on hand, and future collections, may be used in partial payment of the judgments. Before actually making payment, you should receive partial satisfactions of judgments and ascertain from the Clerk of the Circuit Court of Lake County that the judgments have neither been assigned nor paid.

July 7, 1941.—041-368.

**LAKE COUNTY—PAYMENT OF PROCEEDS OF SPECIAL AD
VALOREM TAX TO PAY JUDGMENT**

QUESTION: Judgment was rendered George J. McVey against Lake County Special Road and Bridge District No. 9 on December 16, 1937 in the amount of \$29,118.19. Pursuant to the order of the United States District Court, the Board of County Commissioners made a levy specially for the purpose of paying this judgment. The Board of Administration has on hand the sum of \$1,804.26 representing the proceeds of this special levy. Would the Board of Administration be legally authorized to use the proceeds of the special levy in payment of the judgment?

To Board of Administration:

The identical question involved was answered in an opinion from this office to you under date of April 28, 1941, captioned "Board of Administration—Payment of Proceeds of Special Ad Valorem taxes levied to pay judgment recovered on Refunding Bonds against Hardee County." I held in that opinion that you would be authorized.

October 23, 1941.—041-611.

**LAKE COUNTY—PAYMENT OF EXCESS FUNDS OF SPECIAL ROAD
AND BRIDGE DISTRICT**

QUESTION: All of the indebtedness of Special Road and Bridge District No. 4 of Lake County has been paid. There remains to the credit of that district's sinking fund \$7,150.88, made up of profits realized from investments, tax redemptions and ad valorem tax levies. Should this money be remitted to the Board of County Commissioners of Lake County upon their request so to do, in compliance with Chapter 18632, Acts of 1937?

To Board of Administration:

The statute named applies to funds in the control of the Board of County Commissioners only, and not to funds under the control or in the hands of the Board of Administration.

Assuming that the profits named have been realized from investment of the funds originally credited to the county from gasoline taxes, and apportioned to the district, the item of \$6,273.33 should be transferred to the county interest and sinking fund, and re-apportioned between the county and its several remaining districts, if any, as are second gasoline taxes generally.

Assuming, further, that the other two items were, respectively, realized from redemptions of tax sale certificates issued for non-payment of taxes levied for the purpose of paying the interest and principal of bonds issued by the district for road and bridge purposes within the district, and from taxes levied for the same purpose, I am of the opinion that the

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remittance to the county, presumably for use by it for general purposes, would be an illegal diversion of the funds raised in the district for its own purposes, and that an act of the Legislature would be necessary to transfer such funds to the general county treasury.

November 5, 1941.—041-636.

LAKE COUNTY—PAYMENT OF JUDGMENTS AGAINST ROAD AND BRIDGE DISTRICTS

QUESTION: Would the Board of Administration be authorized to pay judgments, which have been rendered against certain Road and Bridge Districts in Lake County, out of available sinking funds, assuming that such payment would not amount to a preference?

To Board of Administration:

These judgments, as such, may not be legally paid out of available sinking funds made up of gasoline taxes, inasmuch as your Board is contemplated by law to receive as evidence of its obligation to pay and as a consideration for payment, bonds and/or coupons entitled to participate in the distribution of gasoline taxes, and judgments not being bonds or coupons, although based thereon, but representing other items not a part of the original bond obligation.

However, and this suggestion may be regarded as applicable in all cases where there are judgments based upon bonds under your administration—a large measure of relief to the indebted units may be effected by the withdrawal from the court files, under court order, of course, of the bonds and/or coupons upon which the judgment was rendered, and their presentation to your Board for payment as in the ordinary course and as if no suit had been brought thereon or judgment rendered therefor. Such a course of procedure would have the effect of relieving the indebted taxing units from levying an ad valorem tax or otherwise providing for the payment of the judgment except such portion thereof as represents items other than the principal and interest of the original debt—a desirable objective and one contemplated by legislation on the subject.

Of course, the reduction to judgment of a bonded debt would not entitle the judgment-holder to any preference, but his securities would be redeemable in order just as if no judgment thereon had been obtained.

In the event of the withdrawal, presentation for payment to and the payment by your Board of any such bonds, care should be taken to the end that satisfaction of any judgment, to the extent of your payment thereon, be duly executed and recorded.

December 4, 1941.—041-675.

LAKE COUNTY—PAYMENT OF EXCESS ACCUMULATIONS

QUESTION: All of the bonded indebtedness of Lake County Special Road and Bridge District No. 4 has been fully paid and the Board of Administration holds a balance in the District's sinking fund of \$7,150.88, made up of collections on investments, tax redemptions, and ad valorem taxes. Is the Board legally authorized to remit the amount above named to the Board of County Commissioners of Lake County, pursuant to resolution of request under Chapter 19926, Acts of 1939?

To Board of Administration:

Chapter 14486, Acts of 1929, created the Board of Administration as a depository of sinking funds, delinquent taxes and other monies for the

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road and bridge indebtedness of counties and special road and bridge districts. The powers and duties of the Board have since been enlarged by Chapters 15891, 19279, and 20302, Acts of 1933, 1939 and 1941, respectively.

The Legislature of 1929 also undertook to create a fund to be derived from gasoline tax levies which was to be administered by the Board of Administration for the benefit of counties and special road and bridge districts, but that act was found to be unconstitutional. In 1931 the Legislature enacted Chapter 15659, involving the same principles as the invalid act of the 1929 session, but limited in its application so as to make counties and special road and bridge districts beneficiaries of the funds raised by gasoline tax levies to the extent of their contributions to the system of State roads, the distribution being based upon three factors, viz: amounts expended in the construction of State roads, proportionate area and proportionate population, the first including expenditures by the county and the special road and bridge districts therein, and the last two treating the county as the unit.

Since, therefore, special road and bridge districts are recognized only because of and to the extent of their bonded indebtedness and are entitled to participate in the distribution of gasoline taxes only in the proportion that such indebtedness bears to the total indebtedness of all other such districts, including the county thereof, I am of the opinion that when the indebtedness of the district is fully paid, all gasoline tax funds credited to the county should be apportioned between the remaining special road and bridge districts and the county, which still have outstanding bonded indebtedness entitled to participate in such funds, according to sub-paragraph (c) of Section 14 of Chapter 14486, Acts of 1929, as last amended by Chapter 20302, Acts of 1941.

While Chapter 19926, Acts of 1939, the basis of the resolution under consideration, appears in the printed volume of Special Acts, it may not, in my opinion, be regarded as such because it affects a State agency, funds created by a State tax levy, and is, in effect, an amendment of statutes of general application throughout the State. For these reasons, especially the last named, it was subject to amendment and has been amended, with reference to gasoline taxes, their distribution and use, by the series of enactments of the 1941 Legislature, although probably effective as to funds in your hands derived from other sources and credited to the district in question.

I call attention also to the failure of the title of the Act in question to mention the Board of Administration upon whom certain duties are sought to be imposed by Section 3 thereof.

Such being my views of the law, and assuming that the item "Collections on Investments, \$6,273.33" represents the principal sum—of funds of the district—derived from gasoline taxes invested by you, or the interest thereon, I am of the opinion that the amount named should not be paid over to the Board of County Commissioners, as requested by the resolution, but should be transferred to the credit of the county and re-apportioned as required by sub-paragraph (c) supra, and to the funds out of which the original investment was made.

The above ruling does not apply to the other two items covered by the resolution as Chapter 19926, supra, may be regarded as effective in respect thereto.

April 11, 1942.—042-185.

LEE COUNTY—PAYMENT OF BONDS HELD UNDER FUTCH ACT

QUESTION: Is the Board of Administration authorized to pay certain bonds issued by Pine and Bocilla Island Special Road and Bridge

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District, heretofore accepted and now held by Lee County in payment of taxes under Chapter 16252, Acts of 1933, the Futch Act, under authority of Chapter 18649, Special Acts of 1937?

To Board of Administration:

Inasmuch as the bonds in question have been recognized as eligible for participation in gasoline tax distribution, I am of the opinion that payment by you is authorized under the special act named, even though distribution among the several county accounts has not been made as contemplated by the Futch Act, Chapter 18649, being plain and unequivocal in its directions, and the preamble thereto appearing to recognize the difficulty, termed impossibility, of such distribution.

December 30, 1941.—041-698.

LEE COUNTY—PARTICIPATION OF BONDS IN GASOLINE TAX FUNDS

QUESTION: Are Lee County Pine Island and Bocilla Special Road & Bridge District bonds dated May 1, 1929, and, according to letter of the Clerk of the Circuit Court of Lee County, sold on January 8, 1930, and now outstanding, entitled to participate in the distribution of gasoline tax funds?

To Board of Administration:

Since these bonds appear to have been actually issued, delivered and outstanding on or prior to July 1, 1931, and, according to the letter from the Clerk, the proceeds thereof were used for the construction of a road designated a State Road by Chapter 15009, Acts of 1931, I am of the opinion that they are eligible for participation in the distribution of gasoline tax funds in your control and credited to Lee County in regular course.

July 9, 1942.—042-343.

MANATEE COUNTY—FEES OF PAYING AGENT

QUESTION: When Sarasota County was created out of Manatee, it assumed part of the indebtedness of the parent county represented by two Countywide bond issues under administration by your Board. The bonds have been fully paid, but Sarasota still owes Manatee \$34,115.63, for which a tax levy is being made by Sarasota pursuant to writ of mandamus, the proceeds of which are remitted to the Board of Administration and by said Board placed to the credit of the appropriate account of Manatee. The Board of Administration now has on hand in that account \$1,801.65. May the Board of Administration use the above named funds to pay a bill of Manatee County's paying agent, said Board having furnished a small portion of the funds to complete a refunding program by Manatee, the balance being supplied by Manatee from the proceeds of the sale of refunding bonds?

To Board of Administration:

Since the debt of Sarasota to Manatee appears to be an ordinary debt, to pay which a tax levy is being made by the former, it would seem that, like the controversy between St. Johns and Flagler Counties, recently before you, there is no legal requirement that the funds so raised be handled by you at all, but that the regular course would be to remit the same to Manatee direct, in which event Manatee might pay direct the fees of the paying agent. However, since the funds are remitted to

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you and placed to the credit of Manatee's interest and sinking fund account, presumably by common consent, thus making your Board the voluntary clearing house, I am of the opinion that you have authority to use the said ad valorem tax funds to pay the fees of the paying agent upon appropriate resolution of the Board of County Commissioners of Manatee, and, as you have been heretofore advised in other cases, to pay out of gasoline tax funds, if necessary, such proportion of the fees as are represented by the funds paid by you to complete the refunding program.

April 9, 1942.—042-164.

MARION COUNTY—CHARGES OF PAYING BANK

QUESTION: Has the Board of Administration authority to pay certain fees of Central Hanover Bank and Trust Company, in connection with a certain refunding issue of Marion County?

To Board of Administration:

As I have heretofore said under like circumstances, in my opinion, you are not authorized to pay such fees out of gasoline tax funds except in proportion to the funds actually furnished by you in these refunding operations. However, if you have on hand to the credit of the County funds earmarked for such purpose, a resolution of the Board of County Commissioners would be sufficient authority for you to so use the same.

The fact that the refunding was not handled by a fiscal agent, as the term is ordinarily used, is of no moment, since gasoline tax funds are available under the law only for the payment and redemption of bonds and interest thereon entitled to participate in gasoline tax distribution, and for your own administrative expenses.

April 18, 1941.—041-202.

MARION COUNTY—REFUNDING EXPENSES—PAYMENT OUT OF SPECIAL FUND

QUESTION: The Board of Administration has received a copy of a resolution of the Board of County Commissioners of Marion County, dated February 18, 1941, requesting the Board to pay expenses incident to the refunding of Marion County Highway bonds, such as those for legal services, cost of printing of bonds, validation certificates and advertising.

Is the Board of Administration authorized to pay these refunding expenses out of the debt service account consisting of proceeds of a one-mill tax levy in which there is now an amount more than sufficient to pay the refunding expenses totaling \$2,963.65?

To Board of Administration:

The Supreme Court of Florida declared, in the case of *Taylor vs. Williams*, 195 So. 184, text 187:

"The expense being an incident to a readjustment of the debt evidenced by the original bonds and to be evidenced by the refunding bonds, it is just and equitable and logically legal that the fund with which to pay such incidental expense should come from the identical source from which is to come the funds with which to discharge the debt and the interest as it accrues on the debt.

"So it is that the taxing unit having the power to levy taxes to pay the debt according to the terms of the readjustment may levy the nec-

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essary tax on the same tax resources to pay this incidental expense of readjustment. . . ."

The issuance of refunding bonds by a county is a lawful undertaking involving some expense, no matter how economically this undertaking is performed. The one-mill tax levy was levied for the exclusive purpose of paying the refunding expense, and as there are sufficient funds with which to pay this expense from the one-mill tax levy, it is my opinion that the Board of Administration is authorized to pay the \$2,963.65 out of the special tax levy of Marion County levied for payment of expenses incident to the refunding operations.

June 6, 1941.—041-317.

MONROE COUNTY—PURCHASE OF JUDGMENT

QUESTION: On August 12, 1940, a judgment was obtained by W. J. Noel against Monroe County, Florida, same being case No. 2-490, involving \$26,000.00 County of Monroe, Florida, Refunding 6% Bonds dated April 1, 1929, interest coupons totaling \$13,320.00, and accrued interest of \$9,799.78, plus costs in the amount of \$6.75, the portion of Judgment based on securities administered by the Board of Administration, which includes bond principal, interest coupons and interest after maturity, being a total of \$48,256.66. Mr. Noel has offered to sell said judgment for 98 per cent of the aforesaid \$48,256.66 figure, or \$47,291.53, for which he will give a full and complete satisfaction of the judgment in the principal sum of \$49,019.78, plus costs in the amount of \$6.75, making a total of \$49,025.53. Would the Board of Administration be legally authorized to purchase this judgment with gasoline tax funds now carried in the Kanner Bill account of Monroe County?

To Board of Administration:

It is provided in sub-section (d) of Section 1 of Chapter 15891, Laws of Florida, Acts of 1933, which is known as the Kanner Bill, that bonds must be purchased "at a price below the par value thereof" and further in said sub-section that they should be "acquired at greatly depreciated prices below the par value thereof." The bonds which are under the jurisdiction of the Board of Administration are in the principal sum of \$26,000.00; the interest coupons total \$13,320.00, and together a total of \$39,320.00. Mr. Noel is offering to sell a par value of \$39,320.00 for \$47,291.53. The accrued interest of \$9,799.78, while part of the judgment, could not be added to increase the par value of the bonds so that it could be purchased with gasoline money under the Kanner Bill. It seems to me that it is the spirit and intention of the Kanner law to use the gasoline money for the purpose of purchasing bonds at greatly depreciated prices. The purchase of a par value of \$39,320.00 in bonds for \$47,291.53 certainly does not comply with this law.

It is, therefore, my opinion that the Board of Administration would not be legally authorized to purchase the W. J. Noel judgment with gasoline tax funds now carried in the Kanner Bill account of Monroe County.

February 12, 1942.—042-78.

MONROE COUNTY—PARTICIPATION OF BONDS IN GASOLINE TAX DISTRIBUTION

QUESTION: Bonds numbered 34 and 35 of said issue were not included in the outstanding indebtedness; however, the Board of Administration has just received a certificate from the Clerk of the Circuit Court

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of Monroe County to the effect that said bonds numbered 34 and 35 were issued and delivered prior to July 1, 1931 and were an obligation of Monroe County as of that date.

All of the bonds of said issue which were set up by the Board of Administration in January of 1941, as well as bonds numbered 34 and 35, including a good many past due coupons from all of said bonds, have been reduced to judgment, and according to a resolution adopted by the Board of County Commissioners February 9, 1942, Refunding Bonds have been authorized in lieu of the judgment. The judgment involves matured bonds, matured interest coupons, interest since bond maturity, and interest on interest coupons.

Is the Board of Administration authorized

(1) To include bonds Nos. 34 and 35, with all unpaid coupons attached, in the outstanding indebtedness of Monroe County, pursuant to Chapter 20648, Acts of 1941, assuming that the Clerk will furnish appropriate description of the bonds and coupons.

(2) To include in the records of the Board of Administration as outstanding indebtedness of Monroe County, when same has been properly certified by the Clerk of the Circuit Court, the Refunding Bonds issued in lieu of the items represented by the judgment.

To Board of Administration:

(1) I am of the opinion that Bonds 34 and 35 are entitled to participation in the distribution of gasoline taxes under your control, provided they represent funds which were expended upon what are now State roads, but only so long as they retain their identity as original obligations.

(2) I am of the opinion that your Board is not authorized to include as a part of the indebtedness of Monroe County entitled to participate in gasoline tax distribution, the Judgment mentioned in the third paragraph of your letter, which, as stated, covers all of the bond issue of which Bonds 34 and 35 are a part,—principal and interest thereon after maturity, and interest upon interest coupons, unless, of course, since the Board of Administration has no control over refunding operations, refunding bonds containing such items are issued pursuant to judicial validation, in which latter event, also of course, the original bonds now being administered by you would become of no further validity, but merged into the new issue.

May 28, 1942.—042-264.

MONROE COUNTY—PAYMENT OF JUDGMENT FROM GASOLINE FUNDS

QUESTION: In judgment rendered in Land Title Bank and Trust Company vs. Monroe County—384 K. W. there is a balance in the special levy account representing the proceeds of a levy by Monroe County for payment of this judgment. On April 21st the Board of Administration approved payment of the unpaid balance of the judgment plus interest to date of payment upon presentation of the bonds and interest coupons, together with the full satisfaction of the judgment. Interest not represented by coupons and a part of the unpaid principal is to be paid by special levy funds on hand. The remaining principal is to be paid with

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gasoline tax funds. When such bonds or coupons are presented to the Board is payment now in order?

To Board of Administration:

In my opinion the Board of Administration not only has the authority, but it is its duty to apply available gasoline tax funds to the payment of this judgment in an amount represented by the bonds and interest coupons, but that so much of the unpaid balance of the judgment as is in excess of the principal of the bonds and interest as represented by coupons must be paid out of the special levy funds mentioned. Therefore, payment of the balance of the judgment, as above indicated is in order.

April 11, 1942.—042-188.

OSCEOLA COUNTY—CHARGES OF PAYING BANK

QUESTION: Is the Board of Administration authorized to pay the fees of the paying bank which received proceeds of the sale of refunding bonds, plus funds furnished by the Board of Administration, and accomplished the refunding by buying in the bonds to be refunded?

To Board of Administration:

You are advised, as you have before been advised in similar instances, that, in my opinion, you are authorized to pay such fees only in the proportion that the funds furnished by you to complete the refunding program bear to the total amount of the refund.

September 12, 1941.—041-502.

PALM BEACH COUNTY—PURCHASE OF JUDGMENT AS INVESTMENT

QUESTION: The Palm Beach county commissioners have adopted and transmitted to the Board of Administration a resolution requesting the Board of Administration to purchase, at par and accrued interest, as an investment a certain judgment rendered against a certain road and bridge district of that county and upon road and bridge bonds, duly issued and validated, which participate in the distribution of the second gas tax. Is this judgment a valid investment under Chapter 20302, Acts of 1941?

To Board of Administration:

Section 17 of Chapter 14,486, Acts of 1929, as last amended by Chapter 20,302, Acts of 1941, provides that "The Board of Administration may invest any sinking funds to the credit of any county or special road and bridge district, or other special taxing district, in the hands of the State Treasurer, as County Treasurer ex-officio, in any *bond or treasury certificates of the United States or bonds of any county or special road and bridge district* in the State of Florida entitled to participate herein, whether matured or immatured."

The judgment in question is not such a security as comes within the above description and is, therefore, in my opinion, not a valid investment by the Board of Administration under the statute named.

Furthermore, the statute named provides that the value of the securities, which the Board of Administration is authorized to purchase for investment, must be the price paid therefor, meaning, I take it, the original face value thereof; in this instance, \$8,000.00, plus accrued in-

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terest, and that they must bear three per cent interest while held by the Board of Administration; the Statute further providing that the securities so purchased should not be cancelled, but held as an investment until redeemed, sold or exchanged for refunding bonds.

The statute further provides that such matured bonds shall be "subject to resale, . . . on the same terms and conditions, or may be redeemed for the issuing county or special road and bridge district . . . for the amount thereof plus interest . . . at three per cent."

For the reason that this particular judgment is not such a security as is the proper subject of investment by the Board of Administration and for the other reasons set forth above, I am of the view that, the Board of Administration is without authority to grant the said request of the Board of County Commissioners of Palm Beach County.

March 12, 1941.—041-124.

PASCO COUNTY—PAYMENT OF INTEREST COUPONS ON REFUNDING BONDS

QUESTION: Should the Board of Administration comply with the request contained in a resolution of the Board of County Commissioners of Pasco County, dated February 17, 1941, requesting the Board to pay interest on the 1938 refunding bonds of Pasco County (Countywide), and Pasco County Special Road and Bridge Districts at the rate of 5 per cent? The 1938 refunding bonds have 4 per cent interest coupons attached. The Board has been advised unofficially that there have been two sets of interest coupons for these bonds, one attached for 4 per cent and the other detached for 1 to 1½ per cent under an alleged agreement between Pasco County, Florida, and the First National Bank of Chicago and R. E. Crummer & Company, where it is stated that interest coupons in excess of 4 per cent will be handled by the Bank of Pasco County, Dade City, Florida, under an escrow agreement entered into by it with R. E. Crummer & Company and the incorporated municipalities of Dade City, Zephyrhills and San Antonio in Pasco County. It is further alleged that these municipalities will receive annual payments of not exceeding \$31,500.00 to be applied to their revised debt service requirements. The State Auditor's report No. 2179 as of September 30, 1938, regarding Pasco County refunding bonds dated April 1, 1939, comments on the plan that the above mentioned smaller coupons of 1 to 1½ per cent are to be delivered to the trustees for the cities of the county to aid them in servicing their refunding bonds. Under these facts, should the Board of Administration pay 4 per cent or 5 per cent interest on the 1938 refunding bonds of Pasco County?

To Board of Administration:

The refunding bonds mentioned herein were issued pursuant to Chapter 15772, Acts of 1931, Ex. Sess. The purpose of the statute authorizing counties and other taxing districts to issue refunding bonds, was to enable overburdened, debt-ridden political entities to refinance and spread their obligations over a period of years at a lower rate of interest if possible. The Supreme Court of Florida, in the case of Manatee County vs. State, and six other cases, 190 So. 687, states as follows:

"The statute authorizing counties and other taxing districts to issue refunding bonds is limited in its scope to the retirement of outstanding bonds and does not, expressly or impliedly, authorize one taxing district to invade the province of another, and in any wise assume or become responsible for payment of its obligations; . . ."

As stated by the Supreme Court, Chapter 15772, Acts of 1931, Ex. Sess., does not admit an interpretation authorizing one taxing district

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to invade another. The law governing the powers and duties of county commissioners and municipalities is as distinct as the law governing municipal corporations and corporations for profit. The county commissioners and municipalities operate in separate fields. The resources of each are derived from entirely difference sources, and both are limited in different ways. To permit the payment of the differential interest rate, that is, any payment of the unattached interest coupons, will allow no end to the manner in which taxing district funds may be juggled and manipulated.

It is my opinion that the Board of Administration should not comply with the request contained in the resolution of the Board of County Commissioners of Pasco County, dated February 17, 1941, instructing the Board to pay interest on the Pasco County (Countywide) and Pasco County Special Road and Bridge Districts at the rate of 5 per cent. Payments should be restricted to the 4 per cent. as specified in the interest coupons attached to the refunding bonds.

April 10, 1942.—042-181.

PASCO COUNTY—CHARGES OF PAYING BANK

QUESTION: What is the authority of the Board of Administration to pay the bill of the paying bank, in view of the fact that the refund of the bond issue was accomplished by delivery by the county to the paying agent of the proceeds of the sale of the refunding bonds, supplemented by funds furnished by the Board?

To Board of Administration:

As you have been heretofore advised under similar circumstances, I am of the opinion that the Board of Administration is not authorized to pay the fees of the paying agent except in proportion to your contribution toward the refunding program.

April 18, 1941.—041-204.

PINELLAS COUNTY—PAYMENT OF CLERK'S BILL FOR VALIDATING REFUNDING BONDS

QUESTION: Would the Board of Administration be legally authorized to use interest and sinking funds of Pinellas County in payment of the bill of the Clerk of Circuit Court for validating the new refunding bond issues of that county?

To Board of Administration:

The Pinellas County refunding agreement dated August 25, 1939, entered into between Leedy, Wheeler & Company and Clyde C. Pierce Corporation, as fiscal agents, and the Board of County Commissioners of Pinellas County, Florida, stated, among other things, that the refunding agents would, at their sole expense and cost, pay all costs incurred in connection with the refunding of the Special Road and Bridge Districts and Countywide bonds of Pinellas County, in the following words:

"(2) That they will at their sole expense and cost, pay all costs incurred by them in connection with the execution of this contract, the authorization and issuance of bonds by the Board in effecting any exchanges or sales of the same, including all legal expense necessary to secure the unqualified approving opinion of the legality of the County refunding bonds and of the District refunding bonds herein contemplated to be issued, and of the proceedings taken to authorize the issue, the proceedings for validation, the proceedings for sale, and all other pro-

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ceedings necessary to the completion of this contract according to its terms, including all fees of attorneys, fees and expenses of depositaries, paying or exchange agents, the costs and expenses of printing bonds and circulars necessary to be issued in connection with either the sale or exchange of the bonds; all court costs in validation proceedings; and other fees and expenses of the Board necessarily incurred by its agents or attorneys in completing the refunding of the bonds of said County and of said District in accordance with the terms of this contract."

In view of the fact that the refunding agents have agreed to pay all costs and expenses, it is, therefore, my opinion that the Board of Administration would not be legally authorized to use interest and sinking funds of Pinellas County in payment of the bill of the Clerk of the Circuit Court for validating the new refunding bond issues of said county.

August 26, 1942.—042-432.

PINELLAS COUNTY—TRANSFER OF FUNDS

QUESTION: Considerable funds derived from special levies laid for the purpose of paying specific bonds and interest coupons are earmarked in several accounts in Pinellas County's credits with the Board of Administration. Is the Board legally authorized to transfer funds remaining in such accounts to other sinking fund accounts, pursuant to paragraph (d) of Section 1 of Chapter 20626, Acts of 1941, assuming that the indebtedness for which the funds were originally raised has been fully paid? What specifically is the authority of the Board as to the funds raised in a subdivision of the county?

To Board of Administration:

While Chapter 20626, supra, paragraph (d), authorizes you to "transfer surplus funds from one fund to another fund when all outstanding indebtedness required to be paid by the fund from which the transfer is to be made shall have been retired and cancelled," I am unable to construe that language to mean that, for instance, funds raised by special levies upon the property in a special road and bridge district to pay the bonded obligations of that district or to maintain roads and bridges therein, may be transferred to the county's general fund, yet the statute is susceptible of that construction.

I am of the opinion, therefore, that the cited statute constitutes sufficient authority for your Board to transfer such excess funds as remain in a fund originally created by a countywide levy to any other fund of countywide scope created to pay a countywide debt of like nature, but that such excess funds as remain in the account of a special road and bridge district may be transferred only to the account of the same district and used to pay the obligations of that district of like nature with those for which the levy was originally laid, or for maintenance of roads and bridges therein, and that new legislation will be necessary before you would be authorized to transfer the excess funds of a special district to any other fund either of the county or other special road and bridge district therein.

January 26, 1942.—042-42.

PUTNAM COUNTY—ROAD AND BRIDGE DISTRICT BONDS— PAYMENT OF INTEREST

QUESTION: Is the Board of Administration authorized to pay interest beyond the date of maturity of bonds if the original contract provides payment only to maturity?

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To Board of Administration:

The Board of Administration is without authority to pay interest beyond the date of the maturity of the bonds, the contract in the instant case, as exhibited by the file submitted to me, showing that the original bond provided for payment only to maturity, as represented by the coupons attached thereto.

February 11, 1942.—042-77.

PUTNAM COUNTY—EXTENSION OF MATURITY DATE OF BONDS

QUESTION: Has the Board of Administration authority to recognize a one-year extension of the maturity date of \$24,350.00 of bonds of Putnam County Special Road and Bridge District No. 3, whose regular maturity was July 1, 1941?

To Board of Administration:

The bonds in question appear to have been issued in 1916, a time when the approving vote of freeholders was not required.

If the bonds provided for the payment of interest on the principal "until paid," there would be no doubt in my mind that the proposed extension should be recognized.

If, however, the original bonds bore interest payable as per the coupons, then the question is presented to the Board of Administration, as one of policy, whether the instant proposal will be sanctioned to the extent contemplated, in lieu of the more cumbersome and expensive process of formal refunding,—a course available to the county and one in which the refunding bonds may properly be dated as of the date of original maturity, and made to bear interest at the same rate from date.

My opinion is, therefore, that if the original bonds bear interest "until paid," the extension would be in order for recognition, but if not, then the Board of Administration may exercise its discretion to the contrary.

April 23, 1942.—042-201.

PUTNAM COUNTY—REFUND OF OVER-PAYMENT

QUESTION: Has the Board of Administration authority to pay H. S. Wells, L. L. Moody, G. L. Broer and Georgia Gomes, as executrix, the sum of \$36.38 from the interest and sinking fund account of Putnam County Special Road and Bridge District No. 2, and the sum of \$85.64 from the interest and sinking fund account of Putnam County Special Road and Bridge District No. 6, to the same persons, under Chapter 19369, Acts of 1939?

To Board of Administration:

The relief Act, Chapter 19369, Acts of 1939, appears to have had for its premise a decree of the Circuit Court enjoining, under Chapter 10023, Acts of 1925, issuance of a tax deed upon certain enumerated tax sale certificates and requiring payment by the owner of the real estate involved of only 25% of the face of the certificates, thus leaving the purchasers thereof out of pocket to the amount of the remaining 75%, and leaving unpaid Clerk's costs in the sum of \$224.00 incurred in the proceedings. There is nothing in the Act to show that the several items required to be paid are predicated upon a distribution of the total among

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the several funds interested in the tax certificates, although in the light of my conclusions, such omission is immaterial.

Under Chapter 14486, Acts of 1929, which created and prescribed the powers and duties of the Board of Administration, the Board of Bond Trustees named in the relief Act were required to transfer to the State Treasurer, as County Treasurer Ex-Officio, "any and all securities, moneys or claims" in their hands as administrators of the sinking funds of the counties and special road and bridge districts for administration by the State Board of Administration according to law, thereby removing from the Board of Bond Trustees any control over such funds.

There are but four purposes to which the Board of Administration may devote gasoline tax funds accruing to the accounts of counties and special road and bridge districts. They are (a) the purchase at the direction of the counties, of its own bonds or those of some special road and bridge district therein at depreciated prices under the Kanner Act of 1933; (b) the payment of the principal and interest of bonds of the several counties and special road and bridge districts entitled to participation in gasoline excise tax levies; (c) investment in certain described securities for the respective counties and special road and bridge districts, and (d) payment of administration expenses incident to such purposes.

All expenditures from funds in the hands of the Board of Administration are required, by Chapter 14486, supra, to be made upon warrants drawn by the State Comptroller, as Secretary of the Board of Administration, upon the State Treasurer as County Treasurer Ex-Officio.

The relief Act contains no directions nor mentions the Board of Administration, but Sections 4 and 5 thereof direct the Board of Bond Trustees of Putnam County to draw and pay the amounts named and to the persons named.

Since, therefore, the relief Act vests no authority and imposes no duty upon the Board of Administration, and since the Board of Bond Trustees of Putnam County have no control over funds in the hands of the Board of Administration, and are without authority to draw warrants against or pay money out of such funds, I am of the opinion that the Board of Administration is not authorized to make the payments involved.

April 19, 1941.—041-207.

SARASOTA COUNTY—GAS TAX MONEY—TRANSFER

QUESTION: The Board of County Commissioners of Sarasota County requests the transfer of sufficient funds from the Kanner Bill account to the interest and sinking fund account of Road and Bridge Refunding Bonds dated October 1, 1932, to increase the interest and sinking fund account to \$86,020.00 and to cause the funds to be applied to payment of interest coupons of said refunding bonds due April 1, 1941. This amount would be necessary if all original bonds had been exchanged; however, all bonds have not been exchanged, and it would take only \$82,400.00 to pay interest on the exchanged refunding bonds, leaving a balance in the interest and sinking fund account of \$3,620.00. Should this balance be earmarked to show it is Gas Tax money transferred from the Kanner Bill account, to be applied exclusively for the benefit of refunding bonds?

To Board of Administration:

The Supreme Court of Florida, in the case of *Cone, et al vs. State, ex rel. Davis*, 198 So. 689, declared, headnote 1:

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"The holder of unrefunded original bonds of special road and bridge district has right, enforceable by mandamus proceedings, to sequester gasoline taxes, appropriated in lieu of ad valorem taxes by county commissioners in county budget exclusively for payment of refunding bonds . . ."

Both the Gas Tax Act, Chapter 14575, Acts of 1929, as amended, and the Kanner Act, Chapter 15891, Acts of 1933, make definite appropriation of the gas tax moneys and delegate no authority to the county commissioners to appropriate them for purposes or in a manner not defined in these Acts. All bonds of counties and special taxing districts are treated in the same manner in the distribution of gas taxes. A refunding bond is nothing more than a renewal of the old obligation. It may, by agreement of the parties, be on different terms, but this does not make them subject to priority in payment.

In *State, ex rel. Georgia Bond & Mortgage Co. vs. Cone, et al*, 137 Fla. 412, 189 So. 47, 48, the Supreme Court held:

"Unless authorized by valid statutory enactments, administrative officials cannot legally levy, budget or apply funds to the payment of refunding bonds or interest thereon, to the exclusion or prejudice of payments on original bonds of the same nature, when the statutes require interest and sinking fund payments for all such bonds to be provided for. . . ."

It is, therefore, my opinion that the \$3620.00 may not be earmarked and appropriated exclusively for the benefit of the refunding bonds.

July 7, 1941.—041-367.

SARASOTA COUNTY—PURCHASE OF INTEREST COUPONS UNDER KANNER BILL

QUESTION: The Board of Administration has been offered matured interest coupons of various issues of Sarasota County Road and Bridge Bonds at a price of \$15,570.00 for par value \$25,112.50 and \$9,353.00 for par value \$9,447.50. The offers are from two separate sources. There are sufficient gasoline tax funds carried in the Kanner Bill account applicable to these issues and the Board has received a resolution from the Board of County Commissioners of Sarasota County authorizing the purchase of these interest coupons. Would the Board of Administration be authorized to purchase these coupons in accordance with the provisions of the Kanner Act?

To Board of Administration:

The purpose of the Kanner Act, which is Chapter 15891, Acts of 1933, was to authorize the Board of Administration to use available gasoline tax funds to retire the largest amount of outstanding road bond indebtedness with the least amount of money. The Board of Administration is therefore vested with authority to disburse funds held in the various Kanner Bill accounts. Since past due interest coupons are outstanding indebtedness of equal dignity with the bond to which they were attached, I know of no legal prohibition against the Board of Administration purchasing this form of road bond indebtedness.

It is therefore my opinion that the Board of Administration is authorized to purchase these matured interest coupons.

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January 9, 1942.—042-14.

SARASOTA COUNTY—PAYMENT OF FEES TO PAYING AGENT

QUESTION: Sarasota County called for redemption on October 1, 1941, certain road and bridge refunding bonds, furnishing direct to the paying agent the funds necessary for that purpose, the Board of Administration not having any part in said transaction. Is the Board authorized to pay the fee claimed?

To Board of Administration:

The independent knowledge of the writer that the call was met largely by the delivery of refunding bonds and that whatever cash was required was furnished by or for the county from other sources to accomplish the purpose of the call, and your statement that the Board of Administration had no part in the transaction, prompts me to the conclusion, and you are so advised, that your Board is not authorized to pay the fee claimed out of gasoline tax funds, or out of any other funds in your control except such as have been raised or supplied by the county for that specific purpose.

January 26, 1942.—042-41.

SARASOTA COUNTY—PAYMENT OF INTEREST AND PRINCIPAL OF BONDS

QUESTION: Order of Dismissal has been entered in the suit of State, ex rel. Meredith vs. Davis. The purpose of the suit was to enforce payment of the proceeds of a 22 mill levy on interest coupons from original bonds; there is a cash balance in said account of \$880.10. Is the Board of Administration legally authorized to use said balance and future receipts from the same source to pay future principal maturities and interest of the said county's bonds?

To Board of Administration:

If this special levy was imposed for the purpose of creating a fund to pay bonds, without reference to any particular bonds or interest coupons, then you are authorized to use the said balance and future receipts from the same source in payment of principal and interest of peremptory bonds of the county. On the other hand, if the special levy was laid pursuant to some court order duly entered in a case in which particular bonds or interest coupons were involved, then the proceeds may be used only for that purpose. If the latter is the case, and the bonds and interest covered by the suit have been fully paid, then the excess is subject to disposition by an act of the Legislature.

May 12, 1942.—042-237.

ST. JOHNS COUNTY—ORIGINAL DEBT—ASSUMED BY FLAGLER COUNTY

QUESTION: Excerpts from State Auditor's Report No. 1328 relating to St. Johns County refunding bond issue of \$427,000 dated May 1, 1925, indicate that Flagler County assumed 8.2% thereof. In line with opinion by Attorney General Cary D. Landis, dated June 4, 1935, referring to the case of State ex rel. Johnson vs. Sholtz, 156 So. 331, the Board of Administration has never distributed any gasoline tax fund of Flagler County in payment of the refunding issue of St. Johns, but Flagler County has been remitting to the Board certain ad valorem tax

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funds which the Board has placed to the credit of St. Johns' refunding bond sinking fund account. Flagler County is anxious for a distribution of its surplus gasoline tax funds, but St. Johns County objects.

(1) Should the Board of Administration recognize any part of the \$427,000 refunding bond issue of St. Johns as an indebtedness of Flagler and distribute a portion of the latter's gasoline tax funds to such indebtedness?

(2) If the answer to (1) is in the negative, should the ad valorem tax funds raised by Flagler be remitted to the Board and by the Board used in payment of the refunding bond debt of St. Johns, or should they be paid direct to St. Johns by Flagler?

To Board of Administration:

(1) A negative answer is required by the Supreme Court decision cited.

(2) The funds raised by ad valorem taxation in Flagler County to pay the debt owing by it to St. Johns—characterized by the Supreme Court as an ordinary debt outside the purview of Chapter 14486, your creative Act,—were never properly remitted to you, but should have been paid direct to St. Johns; that your handling of the same has been simply as a volunteer clearing house, and that, therefore, all such funds should be returned to Flagler, with directions not to make any such further remittance to you.

However, since St. Johns County may be basing its protest against the granting of Flagler County's request upon some right or contingency which has lately arisen, although in the case cited it disclaimed any interest in the funds involved there, I suggest your Board notify St. Johns County that definite action on your part will be delayed for a period named during which such claim as they may have may be asserted by appropriate proceedings.

October 29, 1942.—042-503.

To Board of Administration:

This will acknowledge receipt of yours of the twentieth instant, asking me to refer to my opinion of May 12, 1942 (042-237), attaching resolutions of the Boards of the captioned counties, requesting you to apply Flagler County's gasoline tax credits to the payment of St. Johns' bonds issued to refund bonds originally issued by St. Johns to construct the brick road.

You request my opinion as to your authority to comply with these resolutions.

My former opinion, based upon the case of Johnson vs. Sholtz, 156 So. 331, dealt with ad valorem tax funds raised by Flagler to pay its debt to St. Johns. Gasoline tax funds were not mentioned or considered except in connection with Flagler's request for a distribution of its surplus.

The law and facts governing the respective positions of these two counties were fully adjudicated in the cited case. The Court found that St. Johns issued bonds to build the brick road in 1914. Flagler County was created in 1917. Subsequently the two counties, by virtue of legislative authority, adjusted and fixed the new county's share of the St. Johns' public debt with the result that Flagler assumed and agreed to

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pay to St. Johns County 8 2/10% of the bonded debt incurred by St. Johns for the brick road, but did not issue any bonds or other evidence of such indebtedness.

In 1925 St. Johns issued refunding bonds for the balance of the original issue remaining unpaid. Flagler had no part in this refunding program.

Flagler, after its creation, levied ad valorem taxes to pay the debt, which the Court held was an ordinary debt, and deposited the proceeds in a bank, which later failed. From time to time thereafter the proceeds of ad valorem taxes levied by Flagler were remitted to you, but which the Court held were improperly placed in your hands and should be returned to Flagler.

It was with reference to these ad valorem tax funds that my former opinion was rendered and my suggestion that the parties be afforded time and opportunity to adjust their differences was offered with the expectation that Flagler County might direct you to apply such ad valorem tax funds to St. Johns County's debt for the brick road and receive credit to that extent on its debt to St. Johns.

Now it seems that the counties involved desire that gasoline tax funds to the credit of Flagler be transferred to St. Johns' interest and sinking fund account for the old brick road debt, which cannot be done, in my opinion, for the reasons: (a) that Flagler has no gasoline tax credit based upon any bond or obligation actually issued by it and outstanding July 1, 1931, or bonds issued by it to refund such; and (b) that St. Johns does have such tax credit based upon refunding bonds issued to refund bonds originally issued to build the brick road when the same was wholly within St. Johns.

I am still of the opinion, however, that all ad valorem tax funds raised by Flagler to pay its debt to St. Johns and remitted to you should be returned, or, in response to proper resolutions by Flagler, placed to the credit of St. Johns' interest and sinking fund to service the old brick road refunding issue of 1925, which is St. Johns' sole responsibility.

May 29, 1941.—041-293.

**ST. LUCIE COUNTY—COMPLIANCE WITH HOUSE BILL NO. 1596
OF THE 1941 LEGISLATURE**

QUESTION: Would the Board of Administration be authorized to comply with the provisions of House Bill No. 1596 in the event same should become a law?

To Board of Administration:

Please be advised that House Bill No. 1596 is an Act entitled as follows:

"An Act authorizing and directing the State Board of Administration to assume jurisdiction of and handle the bonds and interest and sinking fund of Special Road and Bridge District No. 6 of St. Lucie County, Florida, in the same manner that said State Board of Administration now exercises jurisdiction over and handles other bonds and interest and sinking funds of St. Lucie County, Florida and its Special Road and Bridge Districts, making provision for said Special Road and Bridge District No. 6 to receive credit for a ratable share of any monies which may be available to the said State Board of Administration to the credit of St. Lucie County and said County's Special Road and Bridge Districts."

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Section 20 of Article III of the Constitution of Florida provides in part as follows:

"The Legislature shall not pass special or local laws in any of the following enumerated cases; that is to say, regulating the jurisdiction and duties of any class of officers, except municipal officers . . ."

Section 19 of Chapter 14486, Laws of Florida, Acts of 1929, which is known as the Board of Administration Law, provides as follows:

"No bonds shall be permitted to participate in the distribution provided for herein except those bonds issued and outstanding on April 1, 1929; provided, however, that any County bonds already voted and authorized pursuant to any written agreement between any County and the State Road Department which was made prior to April 1, 1929, for the cooperative construction of any State road, although not sold or delivered, may participate in such distribution from the time the State Road Department receives the said bonds or the proceeds of the sale thereof for the purpose of carrying out said agreement."

House Bill No. 1596 is a local law, which authorizes and directs the State Board of Administration to assume jurisdiction and handle certain bonds. It is to be noted that the bonds set up under House Bill No. 1596 are dated January 1, 1939. The Board of Administration Law provides that said Board shall handle only such bonds as shall have been issued and outstanding April 1, 1929. Therefore, House Bill No. 1596 attempts, through the passage of a special or local law, to regulate the duties of the Board of Administration. The Board of Administration is composed of the Governor, State Treasurer and Comptroller, each of whom are State Officers. This law attempts to regulate the duties of such officers because it imposes upon them authority and jurisdiction to supervise and handle the bonds and interest and sinking fund of St. Lucie County Special Road and Bridge District No. 6. Such jurisdiction can only be conferred upon said Board of Administration through the enactment and passage of a general law.

It is, therefore, my opinion that in the event House Bill No. 1596 becomes a law that the Board of Administration would not be authorized to comply with the provisions of this law by assuming jurisdiction of forty-three thousand dollars St. Lucie County Special Road and Bridge District No. 6 bonds, dated January 1, 1939.

October 3, 1941.—041-560.

ST. LUCIE COUNTY—TRANSFER OF KANNER ACT FUNDS TO PAY JUDGMENT

QUESTION: Is the Board of Administration authorized to comply with a resolution from the Board of St. Lucie County Commissioners requesting it to transfer Kanner Act funds to pay a judgment in the case of C. J. Root vs. St. Lucie County, assuming the payment would not be a preferential one, or if a preferential payment, would the Board of Administration be authorized to pay the judgment?

To Board of Administration:

My answer to both questions must be in the negative, except as to such funds, if any, in your hands, which have been collected in obedience to the court's decree.

So much of the resolution as requests the transfer of funds from the "Kanner" account to the interest and sinking fund may, of course,

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be complied with, but neither "Kanner" funds, as such, or the interest and sinking funds may, in my opinion, be devoted to the payment of the judgment in question if, by so doing, preference is given to the judgment-holder over creditors holding obligations of equal or prior dignity to the bonds which were the basis of the judgment, as to the facts of which I have not been advised.

December 6, 1941.—041-670.

ST. LUCIE COUNTY—AUTHORITY TO SELL REFUNDING BONDS

QUESTION: The Board of County Commissioners of St. Lucie County requests the Board of Administration to permit Indian River, Okeechobee and Martin Counties to redeem, at par and interest, any portion of their road and bridge refunding bonds dated July 1, 1937, issued for the purpose of paying the three named counties' proportion of road bonded indebtedness originally incurred by St. Lucie County, the bonds sought to be redeemed being now held by the parent county. Is the Board of Administration legally authorized to sell refunding bonds of the three junior counties to their respective sinking fund accounts?

To Board of Administration:

Inasmuch as the bonds in question are held in the sinking fund of St. Lucie County, and the same are original issues of the three junior counties, although called refunding bonds, issued for the purpose of paying their proportion of the original bonded debt of St. Lucie County, I am of the opinion, and you are hereby advised, that there would seem to be no point in selling these bonds to the sinking fund accounts of the three counties named, but that the proper course would be to redeem the same for cancellation, or so much thereof as sinking fund accounts will permit, having due regard, of course, for any other outstanding bonded indebtedness under your supervision, of the three counties named.

February 18, 1942.—042-88.

**ST. LUCIE COUNTY—SPECIAL ROAD AND BRIDGE DISTRICT NO. 5
BOND NO. 231**

QUESTION: Is the Board of Administration authorized to pay interest after maturity date of the bond?

To Board of Administration:

The contract provides for the payment of interest only according to and upon presentation of interest coupons, and, therefore, payment of any additional amount, whether of interest on the principal or upon interest, is unauthorized.

October 15, 1941.—041-580.

WAKULLA COUNTY—APPORTIONMENT OF SINKING FUND

QUESTION: May the Board legally spread the sinking fund account of Wakulla County over a period of five years, thereby creating a surplus which would be available for Road and Bridge District Fund?

To Board of Administration:

In my opinion, the Board of Administration may lawfully comply with the request in an exercise of the discretion vested by Chapter 20302, Acts of 1941, to apply and apportion to the sinking fund of the county

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"the annual amount which the Board may determine is reasonably necessary to be deposited to meet maturities of said participating bonds."

However, I suggest that before any such adjustment is effected, the Board of County Commissioners adopt and file with you its formal resolution requesting the proposed action on your part and containing a recital of the circumstances which they deem sufficient to justify this request.

June 17, 1942.—042-298.

WASHINGTON COUNTY—BONDED INDEBTEDNESS

QUESTION: All the bonded indebtedness of Washington County is expected to be retired on July 1, 1942. In connection with Chapter 20516, Acts of 1941, what is the proper procedure to be followed in distributing surplus gasoline tax funds to Washington County after provision has been made to finally retire its bonded debt on July 1, 1942?

To Board of Administration:

Chapter 20516, Acts of 1941, became a law May 29, 1941, and went into effect July 1, 1941. It contained a repealing clause and, by its own terms, expires July 1, 1943. All other Acts of the Legislature touching the subject matter of gasoline taxes and their distribution were enacted and became laws prior to the enactment of this special Act.

As I construe the Act, all funds in excess of the county's requirements for bonded debt, from and after July 1, 1941, should have been placed to the credit of the State Road Department for use by the latter upon State roads and County graded and drained roads, and there was no such thing as a surplus after said date. The same will be true of all second gas tax funds accruing to the county after provision has been made for the retirement of its bonded debt and until July 1, 1943, since the Act in question effects no changes in previous statutes or Acts of the same session touching the distribution of such funds generally.

Washington County, therefore, has no surplus and will have none during the life of this Act, since all funds accruing to it from the second gas tax over and above its debt requirement are required to be made available to the State Road Department, the language of the statute in that respect being as follows:

"That it shall be the duty of the Board of County Commissioners of Washington County, and all other officials, either of the State or county, to make such funds available to the State Road Department immediately upon their accrual."

December 7, 1942.—042-549.

BALANCES—IN ACCOUNTS WHERE ALL BONDED DEBT HAS BEEN PAID—DISPOSITION

QUESTION: What is the proper disposition, after January 1, 1943, the effective date of Section 16 of Article IX of the Constitution, of funds remaining in the account of a bond issue which has been fully paid?

To Board of Administration:

If the taxing unit is a special road and bridge district, or other special taxing district, ad valorem tax funds levied to pay bonds may properly be disposed of only in pursuance of valid legislation. If levied

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for maintenance, they should be returned to the county for the account of the district, if the roads involved are being maintained by the county.

August 18, 1942.—042-401.

BONDS—MERGED IN JUDGMENT—METHOD OF PAYMENT

QUESTION: What is the proper method to be employed in making payment of actual bonds and coupons which have been reduced to judgment, whether the judgments are now being litigated or not?

To Board of Administration:

I have heretofore approved the payment of bonds and interest coupons merged in judgments upon presentation of the original obligations and pro tanto satisfaction of judgment, and now am aware of no legal obstacle in the way of a continuation of that course.

However, in the cases mentioned by you as pending on appeal to the United States Circuit Court of Appeals, the perfecting of the appeal with supersedeas had the effect of removing the entire case out of the jurisdiction of the District Court.

My information is that an ex parte order has been entered in the District Court permitting the withdrawal of the original securities and that they are now ready for presentation to you.

In view of the status of these cases, I have verbally stated to a representative of the judgment-owners that I would require an authenticated copy of the order referred to for the Board's files as a condition precedent to my approval of payment and to my entering into the stipulations which have been tendered for my signature.

When the court order permitting withdrawal of the securities, duly authenticated, is exhibited to me, I shall then probably be able to enter into the proposed stipulation, whereupon you would, in my judgment, be authorized to pay the bonds and coupons at face value upon presentation to you of the same, together with satisfaction of judgment to the extent of such payment.

March 20, 1941.—041-154.

BONDS—PAYMENT OF INTEREST AFTER MATURITY

QUESTION: Is the Board of Administration authorized, upon request of County Commissioners, to pay interest on bonds after maturity thereof?

To Board of Administration:

There is no legal duty on the Board of Administration to pay interest on bonds after maturity of the principal, where neither the bond itself nor the statute under which it was issued, contemplates or requires the payment of any contract interest rate on the principal of the bond after maturity until such principal is paid. Whatever right to recover interest after maturity there is must be founded on some implied liability that is incident to the existence of the matured and unsatisfied bond. State ex rel. Davis vs. Lee, et al., 156 So. 744.

To divert money will be to deprive others of payment, as the applicable interest and sinking fund exists only to pay principal and interest. One creditor must not be given what belongs to another, for that would be robbing Peter to pay Paul. Bondholders have a vested

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right, and to pay interest after maturity would give certain bonds an enhanced value at the expense of other bonds.

It is my opinion that the Board of Administration may not legally disburse funds in payment of interest on bonds after the maturity date thereof.

All opinions in conflict with this are expressly revoked.

March 15, 1941.—041-139.

BONDS—REDEMPTION—PROCEDURE

QUESTION: Leon County 5% highway bonds dated December 1, 1915, may be redeemed ahead of maturity at any five year period.

(1) Must notice of the intention to redeem be given to the bearer of the bond?

(2) Must the bonds in the event of redemption, be redeemed in their consecutive order?

(3) Is the Board of Administration authorized to redeem, under the redemption provision in the bond, in the absence of authorization from the Leon County Commissioners?

To Board of Administration:

I find as set out in the following seven numbered paragraphs:

(1) That under date of December 1, 1915, Leon County issued 5% Highway Bonds, the denomination of each of said bonds being \$1000.00; the total issue \$200,000; maturity date December 1, 1945, the bonds being numbered consecutively from 1 to 200, inclusive.

(2) The bonds provide for the payment of interest at 5% per annum, payable semi-annually and payment of principal on presentation and surrender of the corresponding coupons annexed thereto and signed by the Chairman and Clerk of the Board of County Commissioners to The National City Bank of New York.

(3) The bonds provide, in the face thereof, and the resolution under which they were issued that the County of Leon reserved the right to redeem not more than one-sixth ($1/6$) of the entire issue of said bonds at the end of each period of five years between date of issue and maturity thereof.

(4) There is no provision in the bonds nor in the resolution under which they were issued as to:

(a) Notice to be given when a bond is redeemed; or

(b) As to the order of redemption of said bonds—that is, whether the bonds be redeemed in numerical order or in some other manner.

(5) Chapter 14486, Acts of 1929, being Section 2470 (1) to 2470 (23 inc.) C. G. L., Perm. Supp., created the Board of Administration. Paragraph 5 of said chapter, 2470 (5) C. G. L., Perm. Supp., made it the duty of the Clerk of the Board of County Commissioners or the Clerk of the Circuit Court of each county to furnish to the State Comptroller a complete list of each and every issue of county bonds for road or road and bridge purposes, and bonds of special road and bridge districts outstanding at the time of the adoption of the Act. This list was to furnish, among other things, the dates of maturities of coupons and bonds. The

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Board of Administration record of Leon County, Florida, 5% highway bonds, which is the bond issue in question, apparently was set up from information furnished it from the Clerk of the Circuit Court of Leon County pursuant to said provision, to-wit: Section 5 of Chapter 14486, Acts of 1929. It would appear that the Clerk of the Circuit Court of Leon County, in furnishing the information as required by said section, arbitrarily scheduled certain bonds as *maturing* December 1, 1930, and certain bonds maturing at five year intervals thereafter until the last group of said bonds which would mature December 1, 1945. I cannot find, as I have heretofore stated, any authority for the Clerk to *arbitrarily select certain bonds* to be subject to redemption on certain five year intervals. The Clerk committed an error when he scheduled certain bonds as having a maturity date when said date was other than December 1, 1945. This schedule of maturities was then set up by the Board of Administration which was as follows:

\$2,000 due December 1, 1930 (Bonds No. 135 and 136)

27,000 due December 1, 1935 (Bonds No. 51 to 66 inc. and 156 to 166 inc.)

34,000 due December 1, 1940 (Bonds No. 67 to 83 inc. and 167 to 182 inc.)

34,000 due December 1, 1945 (Bonds No. 84 to 100 inc. and 183 to 200 inc.)

(6) That the Exchange National Bank of Tampa is the holder of the following bonds in this series, to-wit: Bonds No. 167 to 175 inc.

(7) That under date of November 15, 1940, the State Treasurer forwarded his warrant No. C-3826 in the amount of \$35,700 to the National City Bank of New York to redeem Bonds No. 67 to 83 inclusive, and 167 to 183 inclusive; (which included the bonds of the Exchange National Bank of Tampa). I understand that there was no resolution of the Leon County Commissioners authorizing the State Treasurer to so issue his warrant but that the State Treasurer was following a practice of the past ten years of that office.

I call your attention to what our Supreme Court said in connection with Chapter 14486 in the case of *State ex rel. Gillespie et al vs. Carlton*, 103 Fla. 810; 138 So. 612.

"The duties of the State Board of Administration, as defined by Chapter 14486, Acts of 1929, are principally to apply the county and district funds under their control to the interest and sinking fund accounts of the several counties and districts of the State which have outstanding county road and district bonds, and to do so in such manner that all the available funds accruing to the credit of the several counties and districts shall be applied primarily to the payment of the principal and interest of the bonds of such county and special road and bridge districts . . ."

The court further says in the above case:

"Chapter 14486, Acts of 1929, is for the benefit of the taxpayers and property owners of the State of Florida by providing a state guardianship over the administration of the fiscal affairs arising in connection with county road and bridge district bonds."

and the court says further:

"Chapter 14486, Acts of 1929, is silent as to what shall be done by the State Board of Administration where funds on hand prove insuffi-

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cient to pay all due or past due interest and principal of bonds under its control, but the fact of creation of a Board—a collective body composed of high State officials—suggests some measure of discretion on its part to deal with the practical administration of the law in cases where the statute fixes no direction."

It is my opinion that no notice need be given to the present bearer of the bond and that it is discretionary with the County Commissioners as to the order of the redemption, that is, whether the redemption be in numerical order or in an arbitrary order. It is also my opinion that when the statute is silent on the authority of the Board of Administration to do or not to do a particular act that a large discretion is vested in said Board, especially, if the act is for the benefit of the taxpayer; that at the most, the act of the Board of Administration is voidable only and could be ratified by the County Commissioners; that the exercising of the option of redemption by the Board of Administration was within its discretionary power.

December 18, 1942.—042-565.

BONDS—PURCHASE—AUTHORITY UNDER SECTION 16, ARTICLE IX OF CONSTITUTION

QUESTION: Assuming that there is a \$1,000 past due bond outstanding with no unpaid coupons, which participates in the distribution of the second gasoline tax, will the Board of Administration have authority under Section 16 of Article IX of the Constitution to purchase the bond for another sinking fund account at a price not to exceed \$1,000 for the bond, plus the amount of interest accrued on the bond at the contract rate from maturity date to the date of purchase?

To Board of Administration:

On January 1, 1943, the State Board of Administration, created by Section 16 of Article IX of the Constitution, will succeed to all the statutory powers of Boards of County Commissioners with regard to bonds entitled to participate in the distribution of gasoline tax funds.

Among the powers possessed by Boards of County Commissioners under the statutes, is that of issuing refunding bonds to include interest after maturity. See *State vs. Special Road and Bridge District No. 3 of Palm Beach County*, 10 So. 2d 341.

The State Board of Administration, as a statutory body, was without power to use gasoline tax funds to pay interest after maturity on bonds participating in gasoline tax distribution. See *Holland, Governor, et al vs. State*, 10 So. 2d 338.

Section 16 of Article IX of the Constitution authorizes the State Board of Administration, in addition to the power vested by the statutes, in the matter of the investment of sinking funds, "to purchase the matured or maturing bonds participating herein . . . provided that as to matured bonds, the value thereof as an investment, shall be the price paid therefor, which shall not exceed the par value plus accrued interest." This is almost the exact equivalent of the language of Chapter 20946, Acts of 1941, in this regard.

Since Boards of County Commissioners have been judicially determined as possessing the power to issue refunding bonds to include interest after maturity, the State Board of Administration, as a constitutional body and successor to Boards of County Commissioners, will have

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the same power, although, as a statutory body, it could not use gasoline tax funds for such purpose.

To hold that the State Board of Administration will be confined to the process of issuing refunding bonds to cover such items, is to sacrifice substance for form and places too narrow a construction upon the constitutional body's powers, in view of the well known purpose and intent of the amendment and the history of legislation on the subject.

The practical effect of such a construction would be to require a distressed unit to bear the expense of a refunding issue, sometimes in amounts out of keeping with the expense involved, and run the risk of having to pay a high rate of interest, instead of borrowing from its neighbors at a reasonable and definitely determined rate of interest—a transaction involving a few book entries only.

My opinion, therefore, is that the State Board of Administration, as a constitutional body, may lawfully purchase, with the funds of one taxing unit, the matured bonds of another taxing unit, and pay therefor the face amount of the bonds so purchased, plus interest at the contract rate to date of purchase, the whole investment to bear interest from date of purchase until redeemed at the rate of 3 per cent per annum.

April 10, 1942.—042-182.

BONDS—REFUNDING—PAYMENT OF ADVERTISING COST OF BIDS

QUESTION: Is the Board of Administration authorized to pay the cost of advertising bids for refunding bonds by The Bond Buyer out of gasoline funds or other funds under the control of the Board?

To Board of Administration:

This advertising bill is not one which you have authority to pay out of gasoline tax funds, or other funds in your control, unless the same is earmarked for that particular purpose.

January 25, 1941.—041-16.

BOND OFFERINGS—PROCEDURE IN INVITING UNDER KANNER ACT

QUESTION: What procedure should the Board of Administration follow in inviting bond offerings pursuant to Chapter 15891, Acts of 1933, known as the Kanner Act?

To Board of Administration:

Section 1 of Chapter 15891, Acts of 1933, which amends Section 14 of Chapter 14486, Acts of 1929, states in Sub-section (d) as follows:

“The State Board of Administration shall give due notice of its purpose to purchase any of such bonds by publication of such notice, at least one of which notices shall be published in a newspaper regularly published in the County where such bonds were issued.”

You will note the phrase “at least one of which notices.” It, therefore, appears that it is mandatory on the part of the Board of Administration to publish one notice in a newspaper regularly published in the county where such bonds were issued. The language, however, is not restrictive, and, therefore, if necessary to best effectuate the purposes of this Act, the Board should deem it advisable to publish a notice

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in the Bond Buyer, and mail copies of the notices to various bond dealers. We believe that such procedure would come within the provisions of our statute.

August 25, 1941.—041-474.

FUNDS—DELIVERY TO OTHER THAN DESIGNATED PAYING AGENT

QUESTION: The Board of County Commissioners of Brevard County has requested the Board of Administration to supply Central Hanover Bank & Trust Company of New York City, with funds to pay interest coupons due September 1, 1941, although said bank is not the designated paying agent for such issue, but such delivery to be with instructions that the Central Hanover Bank & Trust Company, in turn, deliver the funds to the regularly designated paying banks. Has the Board of Administration the authority to comply with the request of said Board of County Commissioners?

To Board of Administration:

Inasmuch as the object to be attained is the payment of the bonds, it is, in my opinion, immaterial as to the channels through which that purpose is accomplished, provided no additional costs accrue by reason of the additional handling of the funds for redemption.

November 17, 1942.—042-515.

**FUNDS—RECEIVED TO PAY INTEREST ON ORIGINAL BONDS AT
REFUNDING RATE—DISPOSITION**

QUESTION: On June 23, 1939, (p. 240 Attorney General's Biennial Report 1939-1940) former Attorney General Gibbs interpreted the decision in *Cone vs. State*, ex rel. Massey on various points called to his attention, and under that part of the interpretation reading "that interest at the refunding rate can be made available to the holders of original interest coupons, upon endorsement of the coupons with the amount paid thereon," the Board of Administration has set aside funds in a reserve account to pay interest on original bonds at the same rate of interest borne by the refunding bonds, remitting to the paying bank accordingly.

In a certain reserve account set up upon authority of Attorney General Gibbs' interpretation, there is a large sum of money to pay coupons from original bonds, but no such coupons have been presented at the refunding rate, which is lower than the original; the funds are idle and are of no benefit to the holders of either original or refunding bonds, except as the same may be or has been impounded under court order.

Would the Board of Administration be authorized to return the funds to the regular interest and sinking fund for such use as the law directs?

To Board of Administration:

I do not interpret Attorney General Gibbs' opinion as holding that it is the duty of your Board to set up a reserve account to pay interest coupons from original bonds at the refunding rate. Quite the contrary. The language quoted by you clearly means that you *may* pay interest on original bonds at the refunding rate, but it does not mean that you are prohibited from payment at the original rate or that you may make funds available only to that extent. The statement with regard to endorsement on the coupons of the amount paid could mean nothing more

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than that the holder had accepted a lesser amount for his coupon and to enable you to make the correct book entry.

You will note that in an earlier part of the opinion Judge Gibbs said that you would not be authorized to comply with a resolution of the Board of County Commissioners requesting a transfer from the Kanner account to the interest and sinking fund account sufficient to pay interest on refunding bonds, his reason being that "Such a resolution makes no provision for the interest on unrefunded bonds."

The last quoted language must have been used in the light of the rule announced in the Massey case, *Cone vs. State*, ex rel. Massey, 137 Fla. 417, 189 So. 44, and followed in *State vs. Georgia Bond & Mortgage Company*, 137 Fla. 412, 189 So. 47, *Cone vs. State*, ex rel. Davis, 144 Fla. 738, 198 So. 691, *Cone vs. State*, ex rel. Carter, 144 Fla. 737, 198 So. 692, *Cone vs. State*, ex rel. Woman's Benefit Assn., 144 Fla. 735, 198 So. 701, *Cone vs. State*, ex rel. Whitfield, 145 Fla. 384, 199 So. 327, *Cone vs. State*, ex rel. Whitfield, 145 Fla. 379, 199 So. 329.

All of the cited cases plainly hold that there can be no discrimination between the holders of original bonds and the holders of refunding bonds, so far as gasoline taxes are concerned. Another line of cases holds that ad valorem tax funds, levied to pay refunding bonds, may not be used to pay original bonds, but that the remedy of the holder of the original bonds is to compel such ad valorem levy to pay his bonds if he looks to that source for payment.

Such being the law, I am of the opinion that you are not only authorized, but are in duty bound to return the so-called reserve account funds to the regular interest and sinking fund account, to be used to service appropriate bond issues without preference and in the regular course, and such is my recommendation, based upon the law as I interpret it.

May 30, 1941.—041-296.

GASOLINE TAX FUNDS—ALLOCATION

QUESTION: What is the interpretation of paragraph (b) of Section 1 of Chapter 20302, Laws of Florida, Acts of 1941?

To Board of Administration:

Paragraph (b) of Section 1 of said law provides as follows:

"In arriving at the amount of money available to meet the requirements of interest and principal or sinking funds of the bonds to which such accounts are applicable, respectively, the Board of Administration shall first apply any available funds in the Sinking Fund accounts, so far as may be necessary. If the moneys so applied are not sufficient for said purposes in any county, it shall then apply to meet such requirements, so far as may be necessary, any money to the credit or estimated to be available for the credit of such county from the gas or other moneys made available by law as a supplementary source of revenue."

This section means that whatever funds are on hand now may be applied to payment of principal, interest and sinking fund requirements; that if the money which is so applied is not sufficient to meet the principal, interest and sinking fund requirements, then so far as may be necessary, any money to the credit, or estimated to be available to the credit, of any county, from the gas tax or other moneys made available by law, may be used as a supplementary source of revenue.

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May 30, 1941.—041-297.

GASOLINE TAX FUNDS—DISTRIBUTION TO BOND FUNDS

QUESTION: Gasoline taxes are usually collected by the Comptroller and paid to the Board of Administration the following month after the taxes are collected; that is, the tax required to be paid under Chapter 15659, Laws of Florida, Acts of 1931, from sales made during this month, will probably be paid to the Board the latter part of June. After the Board receives the gasoline tax funds for May, 1941, how should said money be distributed,—should it be distributed pursuant to the provisions of Chapter 14486, Laws of Florida, Acts of 1929, or pursuant to the provisions of Chapter 20302, Laws of Florida, Acts of 1941?

To Board of Administration:

Chapter 20302, Laws of Florida, Acts of 1941, became a law on May 13, 1941, and whatever funds were received subsequent to said date should be distributed pursuant to the provisions of said law. Whatever funds were received by you for that period of time prior to May 13, 1941, should be distributed pursuant to the provisions of Chapter 14486, Laws of Florida, Acts of 1929.

June 17, 1942.—042-297.

GASOLINE TAX FUNDS—DISTRIBUTION TO BOND ISSUES WITHIN EACH COUNTY

QUESTION: The following is a statement of principal, interest, and sinking fund requirements of a County to September 30, 1942:

	<i>Interest</i>	<i>Principal</i>	<i>Sinking Fd. Requirements</i>	<i>Total</i>
Countywide R&B	\$2,000		\$2,500	\$4,500
Spl R&B Dist No. 1	500	\$1,500		2,000
Spl R&B Dist No. 2	700		1,000	1,700
Spl R&B Dist No. 3	300	1,500		1,300
	<u>\$3,500</u>	<u>\$2,500</u>	<u>\$3,500</u>	<u>\$9,500</u>

Some of the interest and principal matured prior to the current fiscal year. Based on our interpretation of the law, assuming that there were no funds on hand at the beginning of the fiscal year and that the county received during the particular fiscal year the sum of \$9,500 from the second gasoline tax, we would have first distributed enough gasoline tax to each subdivision to pay the interest in its order of maturity, then enough to pay the principal in its order of maturity, and the balance to each subdivision to create the necessary sinking fund. In the event only sufficient funds accumulated with which to pay the interest first, and then the principal, and an insufficient amount to create ample sinking funds, it is the policy to apportion all gasoline tax funds over and above principal and interest requirements to each subdivision in proportion that the amount of the sinking fund required in one subdivision bears to the total sinking fund required for all subdivisions.

In some counties that remit considerable ad valorem taxes to this office for interest and sinking fund purposes, of specific bond issues, since it is impossible to determine with any degree of accuracy the amounts which may be so remitted, we put all gasoline tax funds of such counties in a consolidated account for the benefit of all issues, and from this consolidated account transfer the necessary amounts to the issues

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needing same to meet the requirements for interest, principal and sinking funds.

Are the two above methods of distributing gas tax funds in accordance with the intention of the legislature at the time of the enactment of Chapter 20302, Acts of 1941?

To Board of Administration:

Your interpretation of the law governing allocation and apportionment of gasoline tax funds among subdivisions, as indicated above and as illustrated by the example set out, and in which only gasoline tax funds are involved, is, in my opinion, correct.

Whatever difference of opinion on this point exists is due, I feel, to a failure to distinguish between credits and apportionment: credits being based upon county area, county population and contributions by the county and the special road and bridge districts therein toward the State road system, and apportionment upon annual requirements for principal, interest and sinking funds of the several subdivisions, of which the county is one. For the establishment of credits the county and special road and bridge districts therein are treated as a unit, and for apportionment each subdivision as a unit according to its requirements.

Further illustrating from your example, gasoline taxes only being involved, a lack of funds to meet all requirements necessarily produces a proportionate default in all. Just how the Board of Administration uses available funds in the event they are less than required to meet all requirements, whether to pay interest first and then principal, is a matter of discretion, subject, of course, to the rights of priority as between creditors.

What has been said above as to the method of apportionment to meet annual requirements applies, of course, to transfers to interest and sinking fund accounts, except that the law clothes the Board of Administration with the power to determine what is reasonably necessary to be deposited in such funds to meet annual requirements; but in the case of a deficiency, the available funds must be apportioned in the same ratio, i.e., in the proportion that the requirements of one subdivision bears to the total of all subdivisions.

July 10, 1942.—042-344.

GASOLINE TAX FUNDS—PAYMENTS OF TAX ASSESSORS' COMMISSIONS FOR ASSESSING TAXES FOR ROAD AND BRIDGE BONDS

QUESTION: What authority has the Board of Administration to use gasoline tax funds to pay commissions of Tax Assessors for assessing taxes levied for the purpose of servicing road and bridge bond indebtedness participating in gasoline tax distribution?

To Board of Administration:

I interpret Section 193.65 Florida Statutes 1941 (Sections 1 and 1A of Chapter 20,936, Acts of 1941) to mean, and you are now advised, that commissions of Tax Assessors for assessing countywide taxes, whether special or not, as distinguished from special tax school district and special road and bridge district taxes, are payable out of the general revenue fund of the county;

HIGHWAYS, BRIDGES AND FERRIES—Board of Administration**BOARD OF ADMINISTRATION**

That commissions for assessing special tax school district taxes are payable by the county Boards of Public Instruction out of the respective district funds, and

That commissions for assessing special road and bridge district taxes levied to service the district's bonds participating in gasoline tax distribution are payable by your Board out of the proceeds of such levy deposited with you.

The conclusion necessarily follows that gasoline tax funds may not be used for any such purpose, but are applicable only to the payment of original or refunding bonds, or the purchase thereof under the so-called Kanner Act.

December 2, 1942.—042-542.

KANNER BILL—STATUS

QUESTION: What is the status of Chapter 15891, Acts of 1933, now Section 1 of Chapter 20302, Acts of 1941 (Kanner Bill) after January 1, 1943, the effective date of Section 16 of Article IX of the Constitution, adopted November 3, 1942?

To Board of Administration:

The original Kanner Bill was amended in 1939 by Chapter 19279, and now appears as Section 1 of Chapter 20302, Acts of 1941.

The following language of the amendment:

"Said board shall have . . . control and supervision of the proceeds of said two (2¢) cents of said taxes and all moneys and other assets which on the effective date of this amendment are applicable or may become applicable to the bonds . . ."

has the effect, in my opinion, of repealing the statute named, so that any funds in the hands of the State Board of Administration on January 1, 1943, and held to the credit of any county or special road and bridge district, in its so-called Kanner account, pass to the control of the State Board of Administration, as do moneys in the interest and sinking fund accounts, such Kanner account funds being applicable, under said statute, to the bonds of the respective counties and special road and bridge districts, but actually applied by a process different from that by which the Board of Administration applies interest and sinking funds.

June 2, 1941.—041-304.

LEGAL CALL—SUFFICIENCY

QUESTION: Does the failure to have on deposit with the paying bank sufficient money to pay bonds called on the date of call, render the call legally insufficient?

To Board of Administration:

In order to render a call legally sufficient, the bonds must be called in accordance with the bond contract, and there must be available at the paying bank, on the date designated in the bonds, a sufficient amount of money to retire the bonds.

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April 10, 1942.—042-187.

PAYING AGENTS—PAYMENT OF FEES

QUESTION: Where refunding bonds were issued and the same were handled by a fiscal agent who undertook to bear certain expenses in connection therewith, and where the bonds were sold at a discount, in an amount less than the original debt, and the deficit was made up either by the county or its agent and the only payment by the Board of Administration was the accrued interest to date of redemption or exchange, if certain ad valorem funds have been placed in the interest and sinking fund of the aforementioned county, is the Board of Administration authorized to pay therefrom the fees of the fiscal agent?

To Board of Administration:

You are not authorized to pay therefrom the fees mentioned except to the extent in proportion to the amount actually furnished by you to complete the program.

April 25, 1941.—041-223.

PAYING AGENTS—PAYMENT OF HANDLING CHARGES

QUESTION: Should the Board of Administration pay handling charges of paying banks assessed at the usual rate of 1/10 of 1 per cent on principal payments and 1/4 of 1 per cent on payment of interest coupons?

To Board of Administration:

The primary duty of the Board of Administration is to transmit available funds to the paying agent prior to the maturity date of the bonds and interest coupons. Payment of expenses such as these handling charges of the paying banks, is essential in order for the Board of Administration to carry out this primary duty. This expense is an incident to the readjustment of the bonded indebtedness, and the funds with which to pay such an expense must of necessity come from the identical source from which are to come the funds to discharge the debt itself.

In certain cases where there has been a refunding of the bonded indebtedness of certain counties or districts, the fiscal agent who is handling the refunding, frequently agrees at its sole expense and cost, to pay all costs incurred in connection with the refunding of any district or county bonds. In such a case, the payment of these handling charges by the paying bank should be made by the fiscal agent.

It is my opinion that the Board of Administration would be legally authorized to use interest and sinking funds of the applicable taxing units in paying the handling charges of the paying banks, unless the particular district or county had contracted with some fiscal agent who had agreed, in such contract, to pay all expenses and costs in connection with a refunding. In such case, the Board of Administration would not be authorized to pay the handling charges.

July 24, 1942.—042-370.

PREFERENCE—BETWEEN ORIGINAL AND REFUNDING BONDS
STATE, EX REL. LECO PROPERTIES, INC., VS. BOARD OF
ADMINISTRATION

QUESTION: Has a county authority to prescribe a lower rate of interest on bonds or to limit funds available for payment of coupons to payment of interest on refunding bonds alone?

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To Board of Administration:

The writ in the above entitled cause has just been delivered to this office, together with your statement of funds potentially available to pay the coupons involved.

I am of the opinion that the coupons upon which the alternative writ is based should be paid out of the funds which you show to have been reserved to pay interest on original bonds, but at the refunding rate. The county was without power to prescribe a lower rate of interest on the old bonds or to limit the use of such funds to the payment of interest on refunding bonds alone. I am assuming that the \$3,868.92 in the "Reserved Account" is not earmarked in its origin, as perhaps the smaller amount, \$999.83, may be.

Such being my view, I suggest that the Board of Administration tender payment out of the so-called "Reserved Account," thereby obviating the necessity of filing a Return to the Writ on August 7th next.

April 17, 1941.—041-201.

REFUNDING EXPENSES—PAYMENT

QUESTION: The Board of Administration has been furnished with a certified copy of resolution adopted by the Board of County Commissioners of Pinellas County, dated April 12, 1941, which resolution is supplemental to and in connection with original resolution adopted by said Board, authorizing the issuance of refunding bonds dated April 1, 1940, December 1, 1939, and October 1, 1939, covering an agreement of said Board to pay the expenses incident to the refunding of certain Special Road and Bridge District and Countywide refunding bonds of Pinellas County. The resolution authorizes the Board of Administration to pay refunding expenses from applicable interest and sinking funds, it appearing from the resolution that a levy was made and collected for the specific purpose of paying the refunding expenses. It further appears that the Board of County Commissioners of Pinellas County inadvertently omitted to specifically set forth the proportion of the tax levied for the purpose of paying the refunding expense, and, therefore, they submitted this resolution to speak the truth concerning the agreement of said Board to pay the refunding expense from the special tax levy collected and placed in the interest and sinking fund account. Upon the amended resolution, is the Board of Administration authorized to pay, from the applicable interest and sinking fund account, the refunding expenses?

To Board of Administration:

The Supreme Court of Florida has declared in the case of *Taylor vs. Williams*, 195 So. 184, that refunding expenses may not be paid, directly or indirectly, from the interest and sinking fund account. However, the Supreme Court states:

Text 188:

"If the resolution authorizing the issuance of the bonds involved . . . had provided among other things for the levy of a tax to produce a fund sufficient to create an adequate sinking fund to retire the bonds at maturity or on call, and to pay the interest as the same should become due and payable, and with which to pay the expense incident to the consummation of the refunding plan, we apprehend that such a resolution would have been held valid and the funds derived from the levy and collection of such tax available to be used for the purposes named in the resolution."

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It appears from the resolution of the Board of County Commissioners dated April 12, 1941, that the Board of County Commissioners of Pinellas County had actually levied a special tax for the purpose of producing a fund sufficient to create an adequate sum to pay the refunding expenses; that it was only through inadvertence that they omitted to incorporate this statement in the original resolution authorizing the issuance of the refunding bonds. Where it appears in truth and fact that the Board of County Commissioners had made a special levy which is in an amount sufficient to pay the refunding expenses, then even though the Board of County Commissioners had omitted to incorporate such a provision in the original resolution, they could subsequently amend the original resolution *nunc pro tunc* to make payment from the fund levied, assessed and collected for that purpose. I can readily determine that this expense could not be paid from the interest and sinking fund levied solely to pay the principal and interest of the refunded bonds. However, a special tax for the payment of expenses may be so applied.

It is recognized as a matter of common knowledge that where a county finds it advisable to refund its bonded indebtedness, it may be necessary to employ a fiscal agent for such a purpose, because (1) the taxing unit is usually without facilities to locate the bondholders and bring them to a frame of mind to surrender their bonds for bonds bearing less interest and having a less favorable maturity, (2) is without facilities to bring the bonds into one central control, and (3) is without the available funds with which to pay the preliminary expense incident to the attempted issuance of said refunding bonds. The expense being an incident to a readjustment of the debt evidenced by the original bonds, and to be evidenced by the refunding bonds, it is just and equitable and logically legal that the funds with which to pay such expense should come from the identical source from which is to come the funds to discharge the debt and the interest as it accrues on the debt. That is accomplished by levying and collecting a special debt service tax. This was performed by the Board of County Commissioners of Pinellas County, and the proceeds of the tax was placed in the applicable interest and sinking fund account.

It is, therefore, my opinion that the resolution passed by the Board of County Commissioners of Pinellas County, dated April 12, 1941, amends the original resolution authorizing the issuance of the refunding bonds *nunc pro tunc*, to speak the truth concerning the agreement of the Board of County Commissioners to pay the refunding expense incident to the consummation of the refunding plan. That said resolution is sufficient, and the Board of Administration is authorized to pay, from the applicable interest and sinking fund accounts, the refunding expenses.

October 15, 1941.—041-579.

SINKING FUNDS—INVESTMENT IN DEFENSE SAVINGS BONDS

QUESTION: May the Board purchase Defense Savings Bonds for County Sinking Fund? What form of registration should be used?

To Board of Administration:

In my opinion the Board of Administration has full authority to make this investment under Chapter 20302, Acts of 1941.

Inasmuch as Section 17 of Chapter 14486, Acts of 1929, as amended by Section 2 of Chapter 20302, Acts of 1941, contains the following language "The Board of Administration may invest any sinking funds . . .

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in the hands of the State Treasurer as County Treasurer ex-officio . . .," the following form of registration would be appropriate:

"J. Edwin Larson, State Treasurer, as County Treasurer ex-officio, Trustee of Sinking Fund for Bondholders of _____ County (or Special Road and Bridge District No. _____ of _____ County). Authority: Chapter 20302, Laws of Florida, Acts of 1941."

July 16, 1942.—042-356.

SINKING FUNDS—INVESTMENT IN UNITED STATES BONDS

QUESTION: What is the proper form of registration certificate to be used by the Board of Administration in the investment of interest and sinking funds in United States Bonds?

To Board of Administration:

Honorable John L. Fahs, Collector of Internal Revenue for Florida, advised the Attorney General, under date of the 15th instant, to the effect that the United States Treasury Department has agreed to the Attorney General's suggestion as to the form of registration certificate to be used in the investment by the Board of Administration of interest and sinking funds in United States bonds, series F and G, and has furnished the Attorney General with a copy of a letter to him from the Under Secretary of the Treasury under date of the 13th instant, setting out what will be acceptable in the way of registration.

In pursuance, therefore, of what appears to be full agreement in this regard, I have drawn and submit below a complete form containing, in somewhat further detail, substantially the same language suggested by the Treasury Department:

"State Board of Administration of the State of Florida, in trust for the bondholders of _____ County (Special Road and Bridge District No. _____ of _____ County) bonds under Chapter 20302, Laws of Florida, Acts of 1941."

The foregoing form is applicable to investments made before July 29, 1942, the effective date of the "Florida Statutes, 1941." After that date the language "Chapter 20302, Laws of Florida, Acts of 1941" should be replaced by the following: "Section 34417, Florida Statutes, 1941."

June 2, 1941.—041-301.

"SURPLUS"—DEFINITION

QUESTION: What is the definition of "surplus" as used in Chapter 20302, Laws of Florida, Acts of 1941.

To Board of Administration:

Paragraph (h) of Section 1 of Chapter 20302, Laws of Florida, Acts of 1941, which law is an amendment to the Board of Administration Act, and in particular Section 14 thereof, provides as follows:

"Any surplus, except Sinking Fund Accounts, remaining to the credit of any county after such application of Second Gas Tax and other funds as is provided in sub-sections (c) or (d), (e), (f) and (g) shall annually be declared a surplus and as such shall be subject to the following disposition: . . ."

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It is to be noted that this section states: "Any surplus, except Sinking Fund Accounts." A sinking fund account is a fund arising from the payment of particular taxes, incomes, or duties, which is appropriated towards the payment of the interest due on a public loan and for the gradual retirement of the principal. Paragraph (h) further states that the surplus shall be annually declared. This must lead to the conclusion that the sinking fund necessities must be based upon the annual requirements, which shall include a sufficient amount in reserve for a year's proportionate share of principal retirement.

Paragraph (h) refers to the provisions of sub-section (c) of this law. It is stated in sub-section (c) of Section 1 as follows:

"In so applying moneys credited to each county, except Sinking Fund Accounts, there shall be apportioned to each subdivision (whether the county itself or road and bridge districts, or other taxing districts therein) such proportion of the moneys as the amount required to meet current annual principal maturities and interest in each subdivision bears to the total current annual principal maturities and interest requirements for all such subdivisions.

"After application of Gas Tax and other funds to meet current annual principal maturities and interest for the fiscal year, there shall be apportioned and applied to the Sinking Fund Account of each participating subdivision of the county, including the county itself, to the extent that such funds are available, the annual amount which by the terms of the participating bonds, is required to be deposited in such Sinking Fund Account, and/or which would otherwise be required to be raised for such purpose by ad valorem levy within such county and subdivisions thereof, or the annual amount which the Board may determine is reasonably necessary to be deposited to meet maturities of said participating bonds. If such funds are not sufficient to meet annual requirements of sinking fund deposits in all participating subdivisions, the amount which is available shall be apportioned between them in ratio that the amount required in one subdivision bears to the total required for all subdivisions."

To further illustrate this point, I cite the following as an example: X County is divided into three districts. District No. 1 has an outstanding bond issue in the principal sum of \$100,000.00; District No. 2 has an outstanding bond issue in the principal sum of \$200,000.00; District No. 3 has an outstanding bond issue in the principal sum of \$400,000.00. Each of these issues is payable in ten years. The interest payments on these issues amount to, respectively, \$4,000.00, \$8,000.00 and \$16,000.00, or a total of \$28,000.00. The annual sinking fund requirements would be 10 per cent of the \$700,000.00 total bond issue, or \$70,000.00 per year. This makes an annual requirement of \$28,000.00 for interest and \$70,000.00 for principal, to be set aside in a reserve account for the retirement of the bonds, or a total of \$98,000.00. In the event X County was to receive \$100,000.00 Gasoline money, then there would be an annual surplus in X County of \$2,000.00 per year.

CURRENT ANNUAL REQUIREMENTS

	<i>Issue</i>	<i>Interest 4%</i>
District No. 1.....	\$100,000.00	\$4,000.00
District No. 2.....	200,000.00	8,000.00
District No. 3.....	400,000.00	16,000.00
	\$700,000.00	\$28,000.00

HIGHWAYS, BRIDGES AND FERRIES—Board of Administration

BOARD OF ADMINISTRATION

10 YEAR BONDS

Annual Sinking Fund Requirements	70,000.00
Total Interest and Sinking Fund Requirements annually.....	\$98,000.00
Gasoline money received	\$100,000.00
Total Interest and Sinking Fund Requirements.....	98,000.00
Annual surplus	\$ 2,000.00

We are advised that it was the intention of the Legislature, by the use of the word "annual" throughout the provisions of this law, that the surplus was to be distributed annually and the sinking fund requirements of the various counties, road or bridge districts, were to be determined upon the annual requirements of such counties, road or bridge districts.

It is, therefore, my opinion that "surplus" as used in this law, means the excess over and above current annual interest, principal and sinking fund requirements.

December 7, 1942.—042-548.

TRANSFERS—FUNDS FROM UNITS WHOSE DEBTS ARE PAID

QUESTION: After January 1, 1943, the effective date of Section 16 of Article IX of the Constitution, will the State Board of Administration have authority to transfer funds levied for the purpose of paying a judgment on specific bonds and coupons to the interest and sinking fund account of the same taxing unit when the funds in the special levy account are no longer needed for the original purpose, and there is still an existing debt in that taxing unit?

To Board of Administration:

Special road and bridge districts have authority to levy taxes for but two purposes, viz: to pay bonds and interest and for maintenance of the roads for which the bonds were issued. Taxes raised for specific purposes may be used for no other purpose, strictly speaking, but as previously advised, I am of the opinion that funds created by a taxing unit in excess of the specific purposes for which levied would, at the instance of a creditor in a proper proceeding, be subjected to a debt of like nature, but to no other purpose, and that, therefore, the application of such excess funds to a like purpose of the district, would not only be equitable and just, but of benefit to the same taxable property, and within the power of the State Board of Administration after January 1, 1943, in the discharge of its duties as successor to the respective Boards of County Commissioners with regard to such obligations.

CHAPTER XX

CONSERVATION, ARCHEOLOGY AND GEOLOGY

• GAME AND FRESH WATER FISH

May 22, 1941.—041-281.

ALLIGATORS—SALE—SHIPMENT

QUESTION: A dealer in alligators located in Broward County accepts a deposit for an alligator; the alligator is shipped into Broward County from Louisiana; the dealer in turn ships the alligator to the buyer. Are such transactions prohibited by Chapter 19706, Special Acts of 1939?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

Chapter 19706, Special Acts of 1939, is entitled "An Act to prohibit in Broward County, Florida, the capture, injury or killing of alligators, the sale, transporting and transporting for sale of alligators, alligator skins, alligator teeth or alligator eggs, and providing the penalty for violation of such Act, and providing for the repeal of all laws in conflict herewith, and for the effective date of this Act."

Section 2 of said Act provides: "It shall be unlawful for any person to offer for sale, sell, transport or transport for sale any alligators, alligator skins . . . within the territorial limits of Broward County, Florida, except as herein provided."

It is my opinion that the provisions of the foregoing Act prohibits transactions as stated in your letter. I regret that I cannot agree with a former opinion rendered by the learned Judge Gibbs under date of March 25, 1940, who held that the Act was only intended to apply to alligators originating in Broward County, Florida.

GAME AND FRESH WATER FISH

July 8, 1942.—042-340.

ARRESTS—BOND ESTREATURE—COSTS

QUESTION: Section 12 of Chapter 13644, Acts of 1929, provides in part as follows:

"The State Game Commissioner and his deputies shall be allowed for making arrests the same fees as sheriffs and the same mileage for conveying prisoners, the same to be taxed as costs in the cause, in case of convictions, and paid in the like manner as the compensation of sheriffs, but no fees or mileage shall be allowed in case of acquittals."

In cases where bonds have been estreated, is the Game and Fresh Water Fish Commission entitled to its costs?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

It is my opinion that you are entitled to costs in such cases, and I base my opinion on Section 12, Chapter 13644, Acts of 1929, which, in part,

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provides that all moneys collected from fines, penalties or forfeitures shall go into the Fine and Forfeiture Fund where such convictions are had, and, inasmuch as a forfeiture of bond which has not been vacated is equivalent to a conviction, you are therefore entitled to your costs.

GAME AND FRESH WATER FISH

March 21, 1941.—041-158.

BLACK BASS—CLOSED SEASON—REGULATIONS

QUESTION: Is the taking of black bass from that portion of the Kissimmee River lying between Highlands County and Okeechobee County regulated by the general closed season on black bass?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

The answer to your question is to be found by determining the boundary lines of Highlands County and Okeechobee County and by determining if there is a population or local act applying to either or both of said counties.

I call your attention to Section 60, C.G.L., which defines the boundary lines of Highlands County. You will observe from reading this section that the eastern boundary line of this county is fixed in the following manner.

"... running east on township line dividing townships thirty-two and thirty-three, to the intersection of same with the Kissimmee River; running thence southerly along said river and *bordering Okeechobee County*, to the intersection of the township line dividing townships thirty-seven and thirty-eight with said river and boundary. . ."

It is therefore, necessary to determine the western boundary of Okeechobee County and I call your attention to Section 57, C.G.L., which fixes the western boundary of Okeechobee County in this manner:

"... thence west on the line dividing townships thirty-two and thirty-three, south, to the Kissimmee River; thence in a southerly direction *in the middle of the Kissimmee River* to the normal water level on the boundary of Lake Okeechobee . . ."

It is apparent, therefore, that the center of the Kissimmee River is the dividing line between Highlands and Okeechobee Counties.

I call your attention to Chapter 19460, Acts of 1939, which was a population act providing that there should be no closed season for fishing with hook and line in the waters of any county in the State having a population of not more than 3,495 and not less than 3,470 according to the last State Census. If my information is correct, the 1935 State Census of Okeechobee is given as 3,484 which would put Okeechobee County within the provisions of this chapter.

It is my opinion that the taking of black bass from that portion of the Kissimmee River lying between Okeechobee County and Highlands County and lying within Okeechobee County is governed by the local or the population act; that is, the east one-half of said portion of the river. The taking of black bass from the west one-half of said portion of this river is governed by the general law unless there is some special or local act, similar to the one which applies to Okeechobee County, applying to Highlands County.

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July 3, 1941.—041-360.

COMMISSION—PURCHASE OF MOTOR VEHICLE EQUIPMENT

QUESTION: Is the Game and Fresh Water Fish Commission authorized to purchase motor vehicle equipment necessary to carry out the provisions of Chapter 13644, Acts of 1929, as amended by Chapter 17016, Acts of 1935?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

The third paragraph of Section 2 of Chapter 17016, *supra*, provides:

"The Commission is authorized to purchase all supplies, equipment, printed forms and notices and to issue such publications as it may deem necessary to carry out the purposes of this act." and Section 13 of said Act provides:

"State Game Fund Established. The funds resulting from the administration of this Act shall constitute the State Game Fund and shall be used in carrying out the provisions thereof and for no other purpose."

I am not unmindful of Chapter 13810, Acts of 1929, as amended by Chapter 20716, Acts of 1941, prohibiting the purchase of motor vehicles by State officers and employees, but in my opinion when one considers the intent of Chapter 17016, *supra*, and the fact that the Commission is authorized to purchase supplies and equipment, and that all funds derived from the administration of the Act must be used for the purpose of carrying out the conservation of our wild life, you are, therefore, authorized to purchase such equipment as is necessary to administer the intent of our Conservation Act. I do not mean by this that the Commission is authorized to purchase cars for game wardens, deputies, agents, etc., but that the Commission is authorized to purchase, for example, tank trucks, for the hauling of fingerlings, tractors, etc.

GAME AND FRESH WATER FISH

June 19, 1941.—041-327.

COMMISSION—PURCHASE OF MOTOR VEHICLES

QUESTION: Is the Game and Fresh Water Fish Commission authorized to purchase motor vehicles under the provisions of Chapter 20896, Acts of 1941?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

The Commission of Game and Fresh Water Fish is not authorized to purchase motor vehicles under the provisions of Chapter 20896, Acts of 1941, for the reason that the Act only relates to the right of the Board of Commissioners of State Institutions and the State Budget Commission to purchase motor vehicles for agencies, departments, officers, and institutions under their respective supervision. Your Commission, not being under the supervision of either of these boards, will not be affected by this legislation.

CONSERVATION, ARCHEOLOGY AND GEOLOGY—Game and Fresh Water Fish**GAME AND FRESH WATER FISH**

November 25, 1941.—041-658.

COMMISSIONER—RIGHT TO ENTER POSTED LANDS

QUESTION:—Does the State Game Commissioner or his deputies have the right to enter posted lands, excluding buildings thereon, privately owned, to enforce the game laws, or to determine whether the game laws are being violated?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

You have the right to enter upon the posted lands, privately owned, for either or both of the purposes stated in your question.

Section 3, Chapter 13644, Laws of Florida, Acts of 1929, provides:

"The State Game Commissioner shall visit each County in the State at least once a year and oftener if it shall appear to him necessary, and shall have authority to employ one assistant State Game Commissioner and not to exceed forty deputy game wardens at large and not to exceed four deputy game commissioners, one of each deputy game commissioners to be a resident of and for each of the congressional districts of the State of Florida. The State Game Commissioner and his duly authorized deputies, together with the executive officials of the State of Florida, shall have the power, throughout the State of Florida, to enforce all laws relating to game, non-game birds, fresh-water fish and fur-bearing animals and to go upon any property outside of buildings, posted or otherwise, in performance of their duties; to execute warrants and search warrants for violation of the laws relating to game, non-game birds, fresh-water fish and fur-bearing animals." (Emphasis supplied.)

GAME AND FRESH WATER FISH

May 7, 1942.—042-223.

FISH—LAWS GOVERNING

QUESTION: What effect has the passage of Chapter 21147, Acts of 1941 on Section 2, Chapter 15123, Acts of 1931?

To Game and Fresh Water Fish Commission:

The 1931 Act makes it unlawful to take fish from the waters of the Homosassa River and its tributaries in Citrus County above or upstream from where Salt River enters the Homosassa River, except by hook and line, rod and reel, and spear, gig, or grain. This same Act designates a point on the Homosassa River approximately one mile east of where Salt River enters Homosassa River and makes it lawful to take salt water fish by means of gill nets from the waters of Homosassa River and its tributaries downstream or west of such point.

The 1941 Act does not repeal the 1931 Act in its entirety, but is an exception to the 1931 Act in that salt water fish may now be taken by gill nets from the Homosassa River approximately one mile further upstream than was permissible under the 1931 Act. In other words, the inhibition against gill net fishing for salt water fish as contained in the 1931 Act has been removed from that portion of the Homosassa River extending upstream approximately one mile from the point where Salt River enters the Homosassa River.

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October 16, 1941.—041-588.

FOX—LICENSE—SEASON

QUESTION: (1) What license fee is required to take red and gray fox?

(2) May they be taken at any time during the year or is the taking of these animals confined to the open season provided for the taking of fur-bearing animals?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

(1) The license fee to be charge depends upon whether or not the taking is by guns and dogs only or traps or other devices or for commercial purposes, and also depends upon whether or not the resident or non-resident has paid a hunting license. More specifically, the answer to your question is as follows:

1. The resident or non-resident who has paid the license fees provided for hunting and taking game and who is taking such animals by guns or by dogs and not by the use of traps or other devices and not for commercial purposes is not required to have any other license than the proper hunting license.

2. If the hunting license has not been paid, or if the person takes for commercial purposes or by traps or other devices, the schedule of the license fee is as follows:

- (a) Resident to take in the county of his residence, \$3.
- (b) Resident to take in any one county of the State other than that of his legal residence, \$10.
- (c) Resident to take in the state at large, \$25.
- (d) Non-resident for each county in which to take such animals, \$25.
- (e) Non-resident to take such animals in the State at large, \$100.
- (f) Non-citizen of the United States must secure a special license from the Commissioner of Game and Fresh Water Fish, which is \$50.

(2) It is further my opinion that the taking of these animals is not confined to the open season for other fur-bearing animals, but that red or grey fox may be taken at any time or place and in any manner, but before one is permitted to do so the license requirements must have been complied with. (See Section 20, Chapter 13644, Laws of Florida, Acts of 1929, as amended by Chapter 20886, Laws of Florida, 1941; Sections 51 and 54, Chapter 13644, Acts of 1929.)

GAME AND FRESH WATER FISH

February 10, 1941.—041-54.

FUR-BEARING ANIMALS—TRAPPING

QUESTION: Are persons trapping coons in areas closed for the hunting of game animals and game birds subject to prosecution?

To Hon. Paul Wongrey, County Prosecuting Attorney, Okeechobee, Florida:

I call your attention to Sec. 1, Chapter 13644, Acts of 1929 being Sec. 1977 (1) C.G.L. Perm. Supp. You will observe that the act defines the

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term "game animals" to be deer and squirrel. You will further observe that the act defines the term "fur-bearing animals" to be muskrat, racoon, beaver, mink, otter, civet cat, skunk, red and gray fox, bear, panther and opossum.

I also call your attention to Sec. 4 of said Chapter 13644. You will observe that this particular section provides that the Game Commissioner, with the consent of the Governor, shall have authority to close any county or part of county to the hunting or trapping of *any one* or more or all kinds of game or *fur-bearing animals*.

In my opinion the notice, a copy of which you furnished me, that has been published closing a certain area in your county to the hunting of game animals and game birds, does not prohibit the trapping of fur-bearing animals.

GAME AND FRESH WATER FISH

October 20, 1942.—042-495.

GAME REFUGES—PROCEDURE FOR ESTABLISHING AND CLOSING

QUESTION: The Game and Fresh Water Fish Commission has adopted the following procedure for closing game breeding grounds and game refuges: 1. Upon motion by the Commissioner from the District in which the area to be closed is located, the Commission goes on record as approving such action. This is shown in the minutes of the meeting of the Commission. 2. An executive order is drawn up which gives the effective date of the order, the period for which the area is to be closed, the legal description of the area to be closed, and carries the signature of the Executive Secretary of the Commission of Game and Fresh Water Fish and the approval of the Governor of the State of Florida. This executive order is published in a newspaper in the County where the land is located for two consecutive weeks prior to the effective date of the notice. Is this procedure proper?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

I note the procedure you have adopted and with a few minor changes and suggestions I believe it is proper.

I respectfully refer you to Section 372.13, Florida Statutes, 1941: Establishment of Game Refuges, etc.: Posting of Same. This section provides that with the advice and consent of the Governor, the Commission shall have authority to establish:

1. Game farms and game breeding grounds for:

(a) Fresh water fish hatcheries and breeding grounds for fresh water fish.

(b) Non-game birds and fur-bearing animals.

This section gives the Commission authority to close:

1. Any stream or part of a stream.
2. Any lake or part of a lake.
3. Any county or part of a county.

The above powers given the Commission are for the purpose of:

1. Establishing such breeding grounds.
2. To reopen such breeding grounds to hunting, trapping, or fishing as may be deemed necessary.

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This section also provides that with the consent of the Governor the said Commission shall have authority to:

1. Close any county or part of a county to the hunting or trapping of any one or more or all kinds of game or fur-bearing animals for such period of time as may be agreed upon.

The Statute also provides the procedure to be followed after the Commission has decided to establish a breeding ground and game refuge, which is set forth as follows:

1. Notice to the effect that such lands or waters to be closed shall be published once a week for two consecutive weeks prior to such closing.

2. The notice shall be by publication in a newspaper in the county in which the lands or waters are situate. (Should the lands or waters lie in more than one county, then the notice should appear in each county.)

3. In the event there is no newspaper in the county in which the lands or waters are situate, the notice shall be posted in three public places in the county for a period of two weeks prior to such closing.

4. The statute also provides that in addition to the requirements as set forth above, numbered two and three, notices shall be placed at three places on or near such waters or land or lands that are to be closed.

5. All closed waters or lands shall be properly posted by the Commission, and no person shall deface, remove, or change in any manner any posters or signs placed by the Commission or its officers. (The posters should be placed in conspicuous places at intervals not more than five hundred feet apart.)

My reason in arriving at this distance is that Section 372.11, Florida Statutes, provides that posters at intervals of not more than five hundred feet shall be deemed sufficient.

It is my opinion that the procedure the Commission should adopt in establishing game breeding grounds and game refuges should be substantially along the following lines:

The Commission by a resolution shall establish the area which is to be closed and specify for what purposes it is to be closed. The resolution shall: (1) provide the period of time for which the area is to be closed, (2) contain a legal description of the area to be closed, (3) direct its Executive Secretary to have the notices published and posted as herein set forth, and (4) bear the approval of the Governor.

The Executive approval, in my opinion, should be substantially in the following language:

WHEREAS, Section.....of Chapter 13644, Laws of Florida, Acts of 1929, grants to the Commission of Game and Fresh Water Fish, with the approval of the Governor, authority to close any stream, or part of a stream, any lake or part of a lake, any County or part of a County, for the purpose of establishing breeding grounds for game, fresh water fish, non-game birds and fur-bearing animals, to close any County, or part of a County to the hunting or trapping of any one or more or all kinds of game or fur-bearing animals for such period of time as may be agreed upon, or to reopen such breeding grounds to hunting, trapping or fishing at such time as may be deemed necessary, and

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WHEREAS, the Commission of Game and Fresh Water Fish by Resolution adopted in regular meeting held in.....on the.....day of.....A. D., 19....., approved the closing for a period of.....years, that portion of.....County, Florida, included in the following description:

(Give legal description.)

and has caused the same to be published for two consecutive weeks (3 publications) in the....., a newspaper of general circulation published in.....County, under dates of....., their intention to close the above described area, and did cause to be placed at three places on or near the above described area, under date of....., notices that the said area was to be closed. Affidavit of proof of publication and affidavit of posting are hereto attached.

NOW, THEREFORE, I, Spessard L. Holland, Governor of the State of Florida, do hereby approve and declare that portion of.....County, as described above, closed to the taking of.....for a period of.....years, beginning on the.....day of.....A. D., 1942.

DONE AND ORDERED this the.....day of....., A. D., 1942, at Tallahassee, Florida.

.....
Governor of the State of Florida.

Attest:

.....
Secretary of State, of the State of Florida.

GAME AND FRESH WATER FISH

July 22, 1942.—042-363.

GAME WARDEN—POWER TO SWEAR OUT WARRANT AND MAKE ARREST

QUESTION: Has a game warden authority to swear out a warrant for the arrest of any person and take the warrant and go after the man, or should he turn it over to the sheriff or a constable of the county?

To Hon. J. E. Pridgeon, County Judge, Gulf County,
Wewahatchka, Florida:

Section 1977 (3), Compiled General Laws, Permanent Supplement, Volume 2, provides in part as follows:

"... The Commission and its duly authorized conservation officers shall have the power throughout the State of Florida to enforce all laws relating to game, non-game birds, fresh-water fish and fur-bearing animals and to go upon any property outside of buildings, posted or otherwise, in performance of their duties; to execute warrants and search warrants for violation of the laws relating to game, non-game birds, fresh-water fish and fur-bearing animals . . ."

Therefore, it is my opinion that a Game Warden has authority to swear out a warrant for the arrest of any person and make the arrest.

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August 21, 1941.—041-466.

LICENSE—FISHING IN OSCEOLA COUNTY

QUESTION: The Legislature of 1939 passed a special act for Osceola County, Florida, whereby non-residents of the State of Florida owning property in Osceola County, Florida, whose current taxes have been paid thereon had the same privilege of fishing in Osceola County under the same license as was then available to the residents of said county. What effect does the enactment of Chapter 20886, Acts of 1941 have upon this said special act?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

The said special act of Osceola County has been repealed by the enactment of Chapter 20886, *supra*.

My reason for so ruling is because in Section 2 of said chapter, it specifically states that all laws, whether general or special, in conflict with the provisions thereof are repealed (excepting Chapter 18445, Acts of 1937), and for the further reason that although a general act will not be held to repeal or modify a special one embraced within the general terms of the general act, nevertheless, if the general act is a general revision of the whole subject, or if the two acts are so repugnant or irreconcilable as to indicate such a legislative intent, then the general act will repeal the special. (See *Sanders vs. Howell*, 74 So. 802).

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January 30, 1942.—042-49.

LICENSE—FISHING—PHOSPHATE PITS

QUESTION: There are numerous large phosphate mines that have been mined out and are now filled with water varying from five to fifty feet in depth, in which mines there are fish; the phosphate mines are privately owned and the owners do not permit the general public to fish, but as a rule the fishing is reserved to the employees of the mine owners. Is a fishing license required of a person fishing in such bodies of water?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

In my opinion such persons need not be in possession of a fishing license to entitle them to fish in such bodies of water, provided such phosphate pits or mines do not exceed one hundred and fifty acres in area, and further provided that such pits and mines are enclosed by a fence.

My reasons for so ruling are because:

(1) Section 23, Chapter 13644, Laws of Florida, Acts of 1929, provides:

"All fish in the rivers, creeks, canals, lakes and other fresh waters within the jurisdiction of the State of Florida, are hereby declared to be and shall continue to be the property of the State of Florida, excluding all privately owned enclosed fish ponds, not to exceed one hundred and fifty acres in area, . . ."

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(2) Such pits and mines obviously do not come within the meaning of the term "rivers, creeks or canals." Neither do I believe that such pits or mines constitute a "lake" because a lake has been defined:

"... An inland body of water of considerable size occupying a *natural* basin or depression in the earth's surface below the ordinary drainage level of the region."

"When a depression in the surface of the earth contains a reasonably permanent body of water which is substantially at rest, and both *depression* and body of water are of *natural* origin or are a part of water course, such depression and water therein constitute a 'lake' as the term is used in the restatement of this subject. Restatement, Torts Sec. 842."

The foregoing definitions are found in Words and Phrases, Per. Ed. Vol. 24, p. 128 and 129. (Emphasis supplied).

Nor do I believe that such pits or mines come within the meaning of the phrase "fresh waters," because I believe the Legislature intended by this term to include those bodies of fresh water that are of such small size that there might be some question as to their coming within the generally accepted meaning of the term "lake."

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April 24, 1941.—041-218.

LICENSE—FORFEITURE

QUESTION: Should the license provided for in Chapter 13644 Acts of 1929, be forfeited and surrendered to the Court when the provisions of Section 36 of said Act have been violated; and if the person does forfeit and surrender said license, may he immediately procure a new one?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

I call your attention to Section 36 of said Act which sets the bag limit for fresh water fish. (This Act was amended by Chapter 15615, Acts of 1931.) Section 70 of said Act provides that, if anyone is found guilty of violating any of the provisions of the Act, he shall be fined or imprisoned and/or both in the discretion of the Court, and that the license or permit shall forthwith be surrendered and that, if the violation occurs in the open season, no license or permit shall be issued at any time during the remainder of such season. There is no prohibition as to the issuance of a license for the coming season if the violation occurs in the closed season, except as to game birds and game animals.

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August 7, 1941.—041-426.

LICENSE—FRESH WATER FISHING

QUESTION: Under Chapter 20886, Acts of 1941, may a person be licensed to fish with more than a single pole and line or rod and reel?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

The granting of the license permits the licensee to fish only with a single pole and line, or rod and reel, or plug, bob, spinner, spoon, fly,

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troll, or other artificial bait or lure, and prohibits fishing with more than one such device. My reason for so ruling is not only because of the wording of the statute, but also because it is the apparent intent of the Act to conserve our wild life, and that it was not enacted for the purposes of revenue. To hold that there is no prohibition against fishing with more than one of the above-mentioned articles is likewise to hold that a license would be required for each and every single pole and line, rod and reel, etc., in excess of one, which, in my opinion, would be to arrive at an absurd conclusion.

It is also my opinion that any resident of the State of Florida is prohibited from fishing in the county of his residence with more than a single pole and line, that he could not be licensed to fish with two poles and lines, and, if he is going to fish with rod and reel, or by one of the methods mentioned above, save and except a single pole and line, that he must secure a license.

GAME AND FRESH WATER FISH

September 25, 1941.—041-531.

LICENSE—FRESH WATER FISHING

QUESTION: Is a fresh water fishing license required to take fresh water fish in the St. Johns River as far north on said river as the Florida East Coast Railway Bridge in Duval County?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

A fresh water fishing license is required to take fish of the fresh water species in this part of the river because of Section 20 of Chapter 20886, Laws of Florida 1941, save and except, however that this requirement is not applicable to any resident of the State of Florida engaged in commercial fishing in that part of the St. Johns River that is under the jurisdiction of the State Board of Conservation.

GAME AND FRESH WATER FISH

June 19, 1941.—041-339.

STATE GAME LANDS—ACQUISITION

QUESTION: The Commission proposes to purchase 64,000 acres of land in Charlotte County for \$3.00 an acre for use as a game breeding and public hunting ground; the purchase will be by contract under the following terms:

Cost of Land	\$192,000
Down Payment 25%	48,000
Balance of Purchase Price	144,000
Annual Payments	24,000
Interest	4,200
Total Annual Payments	28,200

the proposed purchase is to be made a project under the Federal Aid in Wildlife Restoration Act by which the State will be, if the project is approved by the Secretary of the Interior, reimbursed by Federal funds at the rate of 75% of the total cost of the project; national legislation has apportioned to the State for the fiscal year 1942, \$31,225.15, and \$37,000 for the fiscal year 1943; there is no certainty that national legislation

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will apportion any moneys to the State after 1943; the Commission of Game and Fresh Water Fish is sustained solely by the sale of hunting and fishing licenses; and 81% of the annual revenues of the Commission is paid out as salaries for State conservation officials.

Under the foregoing facts, is the Commission of Game and Fresh Water Fish legally authorized to purchase the tract of land?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

Under the provisions of Section 1977 (6) Compiled General Laws, Permanent Supplement, the Commission is authorized to purchase this tract of land for the protection and propagation of game, fish, and fur-bearing animals or for hunting purposes by outright purchase, lease, gift, or otherwise.

I render this opinion solely on the ground as to the legality of the purchase, and do not take into consideration the wisdom and expediency of the proposed purchase.

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August 10, 1942.—042-391.

WHOLESALE DEALERS—AGENTS—LICENSES

QUESTION: (1) Can a person, under Section 61 of Chapter 13,644, Acts of 1929, act as an agent for a wholesale dealer in furs or hides and at the same time be licensed as a resident dealer or buyer in his own name?

(2) Can a person acting as agent for a wholesale dealer ship furs or hides to anyone except the wholesale dealer for whom he is acting as agent?

To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

(1) A person can act as agent for a wholesale resident dealer in furs or hides, and at the same time be licensed as a resident dealer or buyer in his own name.

There is no inhibition in the statute which prohibits a person from working for himself and serving as agent for another at one and the same time.

(2) The agent is violating the law if he ships furs to anyone except the wholesale dealer for whom he is acting as agent unless he procures a license under Section 61, Chapter 13,644, Acts of 1929, which provides:

"... Any resident dealer or buyer who does not solicit by mail, advertise, travel to buy or employ or have agents or traveling buyers shall be deemed a resident local dealer and shall be required to pay a license fee of ten dollars (\$10.00) per annum."

GAME AND FRESH WATER FISH

February 8, 1941.—041-51.

WILD BIRDS—SALE OF FEATHERS

QUESTION: May wild bird feathers taken from birds in this State, elsewhere in this country or in foreign countries, be legally sold in this State for millinery purposes?

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To Hon. I. N. Kennedy, Executive Secretary, Game and Fresh Water Fish Commission:

The provisions of Section 69 of Chapter 13644, Acts of 1929 prohibits the sale of game birds or any part thereof within this State, which prohibition would inhibit the sale of wild bird feathers in Florida whether such feathers came from birds captured in the State or sent into this State from other States or foreign countries.

In prohibiting the sale, bartering or serving in restaurants of such game birds in this State, or any part thereof, it certainly is the intent of the Statute that the feathers of such birds are to be prohibited from sale.

BOARD OF CONSERVATION

June 27, 1941.—041-350.

AGENTS—RESISTING ARRESTS BY

QUESTION: Is there a penalty in case a person resists arrest or interferes in any manner in the arrest of a person by a Conservation agent?

To Hon. S. E. Rice, Supervisor of Conservation:

Section 7524, Compiled General Laws, provides:

"Whoever knowingly and wilfully resists, obstructs or opposes any sheriff, deputy sheriff, constable or other person legally authorized to execute process, in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, shall be punished by imprisonment in the State prison not exceeding two years, or by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars."

It appears from said section that it is applicable to the following classes of officers:

- (1) Sheriff.
- (2) Deputy.
- (3) Constable.
- (4) Other persons legally authorized to execute process;

and that the offense is the resisting or obstructing such a person in the execution of the legal process or in the lawful execution of any legal duty. Bearing this in mind, I call your attention to Section 1977 (107) Compiled General Laws, Permanent Supplement, which provides:

"... The said conservation agents shall have full police power and authority in connection with the enforcement of all laws relating to the conservation and protection of wild life in the State of Florida to the same extent as that of the sheriffs of the State of Florida: and, in the performance of their duties, shall exercise such powers as are conferred upon wardens and other officers by the laws hereby transferred to said Board of Administration." (Emphasis supplied).

Therefore, one who resists arrest by a conservation agent or who interferes with a conservation agent in the execution of legal process is subject to the penalties as provided in Section 7524, C.G.L. supra.

It may be well to add that I do not believe that the ruling of our Supreme Court in the case of *State Ex Rel Price vs. Stone*, sheriff, 175 So. 229, is applicable or controlling in cases as posed by your inquiry.

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of Conservation****BOARD OF CONSERVATION**

December 31, 1941.—041-699.

FISH ILLEGALLY POSSESSED—CONFISCATION

QUESTION: May a conservation officer seize and confiscate fish illegally taken or possessed, there being no statutory authority for such confiscation?

To Hon. S. E. Rice, Supervisor of Conservation:

I am of the opinion that the conservation officer charged with the conservation and protection of our fish, having made an arrest or sworn out a warrant against a person charged with illegally possessing or illegally taking fish, may seize the fish involved in such illegal possession or taking, and/or such warrant.

This opinion is based upon the principle that no person can lawfully deprive the State of Florida of its title in fish inhabiting the waters of said State unless that person shall have taken such fish in a manner that conforms with law; our Supreme Court having repeatedly held that the title to all game (this includes fish) is vested in the sovereign State in trust for the use of its citizens and that the Legislature shall prescribe the means and methods by which the citizens may enjoy the right to reduce such game to their possession.

BOARD OF CONSERVATION

May 5, 1942.—042-218.

**FISH ILLEGALLY POSSESSED—SEIZURE AND SEARCH WITHOUT
WARRANT—DISPOSITION**

QUESTION: (1) May a Conservation Agent search and seize a truckload of fish without a warrant if he has good reason to believe such truck contains mullet or any other food fish of illegal size or that have been caught during a closed season?

(2) What legal disposition should be made of the truckload of illegal sea foods that has been seized? For example: A truck has 4,000 pounds of mullet or salt water trout, and it is estimated that 1,000 pounds are of legal lengths and 3,000 pounds of illegal lengths. Should the entire truckload be confiscated, or should the legal lengths be separated from the illegal lengths and the legal lengths returned to the owner?

If the legal lengths are to be returned to the owner, should the owner or the Conservation Department pay for the expense of separating the legal size from the illegal size? Should the Conservation Department give the illegal size to some Municipal or State Institution, sell them, destroy them, or hold them on cold storage for Court disposition?

To Hon. S. E. Rice, Supervisor of Conservation:

(1) Under certain conditions a Conservation Agent has the right to search and seize a truckload of fish without a warrant, and I refer you to: Section 1861, Compiled General Laws of Florida, 1927, originally Section 2 of Chapter 10123, Acts of 1925; Section 1341, Compiled General Laws of Florida, 1927, formerly Section 1273, Revised General Statutes of Florida, 1920; Section 8326, Compiled General Laws of Florida, 1927, originally Section 1 of Chapter 11385, Acts of 1925, Extra Session; and Section 8323, Compiled General Laws of Florida, 1927, formerly Section 6029, Revised General Statutes of Florida, 1920.

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Under the provisions of the above quoted statutes and under the rulings of our Supreme Court it appears that your Conservation Agents would not be authorized to search trucks transporting mullet during the closed season on such mullet and seize such mullet on said trucks unless the driver of such truck is lawfully arrested under a warrant for his arrest and for the search and seizure or is lawfully arrested without warrant under the provisions of Section 8323, Compiled General Laws of Florida, 1927, above quoted, which requires the offense to be committed in the presence of the officer or that he shall have reasonable ground to believe and does believe the party has committed a felony. Such arrests and seizures would not be authorized unless the arresting officer has some definite information amounting to more than a suspicion that the law is being violated.

(2) In the event the truckload of sea foods has been seized, the proper step to pursue would be to give notice to the accused that within a short period of time, say within twenty-four hours, application would be made to the Court having jurisdiction of the cause for an order of disposition of the entire truckload of fish, thereby allowing the accused an opportunity of filing a claim in his behalf for those fish of legal length.

The law is well settled that the inconvenience of the confusion of goods is thrown on him who produces the confusion and inasmuch as the accused would be the one responsible for causing the confusion of goods by having the illegal fish, it is my opinion that the proper procedure would be by applying to the Court for an order directing disposition of the fish and payment of costs incident thereto. However, since fish are of a perishable nature, it is my opinion that the entire truckload should be placed in cold storage and remain there until an order is procured from the Court.

BOARD OF CONSERVATION

July 12, 1941.—041-379.

LICENSE—BOATS—LENGTH

QUESTION: Would a boat engaged in the fishing industry, as distinguished from boats used solely for pleasure, the catching of fish not being for commercial use, be exempt from payment of the license fee imposed by Chapter 20747, Acts of 1941?

Hon. S. E. Rice, Supervisor of Conservation:

So long as the boat does not exceed 16 ft. in length with a beam not exceeding 4 ft., and further provided the boat is operated for his, her, their or its own use, benefit and purpose, and the same is not hired out by the owner thereof, one such boat is exempt from the license provision of this Act. Perhaps, this illustration will better explain my opinion. The "A" fish company owns and operates a fleet of twelve boats for its own use and benefit; each boat being not more than 16 ft. in length with a beam not exceeding 4 ft. The license fee may be exacted for eleven of said boats.

BOARD OF CONSERVATION

April 11, 1941.—041-194.

LICENSE — BOATS OPERATING OUTSIDE TERRITORIAL WATERS

QUESTION: (1) Should the Supervisor of Conservation collect a boat license from boats that fish beyond the territorial waters of Florida,

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transport fishermen from various Florida ports to the waters beyond the territorial limits of Florida to catch their fish, then return with their catch to Florida ports where their catch is sold and delivered?

(2) Should the Supervisor of Conservation collect a boat license from foreign boats that come in to Florida ports to sell their fish and crayfish that are caught in foreign waters?

To Hon. S. E. Rice, Supervisor of Conservation:

(1) I call your attention to Chapter 17917, Laws of Florida, 1937, which is an Act relating to salt water fishing in the State and other territorial waters of the State of Florida. The Act only purports to regulate salt water fishing in the State of Florida. If the fishing is done beyond the territorial limits of the State of Florida, the Act is not applicable thereto, and for the further reason that the State of Florida could not pass any Act having extra territorial jurisdiction, so, therefore, you should not attempt to collect a boat license from such operators.

(2) You should not attempt to collect a boat license for the reason that Chapter 17917, supra, does not purport to be applicable to such operators, and for the further reason, to construe the Act as applicable to such operators would be in direct conflict with Article I, Section 10, of the United States Constitution.

BOARD OF CONSERVATION

August 7, 1942.—042-385.

PURSE-SEINES—USE

QUESTION: Has the State Board of Conservation the authority to declare an emergency and issue an executive order allowing the use of purse-seines to catch or take food fish?

To Hon. S. E. Rice, Supervisor of Conservation:

It is my opinion that no such emergency exists whereby you have authority to nullify Chapter 16025, Laws of Florida, 1933.

SHELL FISH

July 30, 1941.—041-415.

COON OYSTERS—REGULATIONS

QUESTION: What laws govern the taking of "coon" oysters?

To Hon. S. E. Rice, Supervisor of Conservation:

Oysters under three and a half inches cannot be taken for canning purposes, and all oysters must be culled as to size unless the oysters so adhere to the marketable ones that they cannot be detached or removed therefrom without destroying either a marketable oyster or the oyster under size. If in the taking of the coon oyster of three and half inches or more for canning purposes, oysters under this size are taken incidental thereto, not for the purpose of canning, but because of the adhesion, such taking does not constitute a violation of the law.

My reason for so ruling is because of the provisions of Section 1807, Compiled General Laws, which provide for the culling of oysters and prohibit the taking of oysters under three inches unless the oyster under this size so adheres to the marketable oyster that it cannot be

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detached or removed from same without destroying it or the marketable oyster; and because of Section 1825, Compiled General Laws, which prohibits the taking of oysters under three and a half inches for canning purposes.

The two sections must be read in "pari materia."

SALT WATER FISHERIES

May 1, 1941.—041-233.

FISHING—LAKE OKEECHOBEE

QUESTION: Section 1875, C.G.L. as amended by Chapter 17012, Acts of 1935, provides that Lake Okeechobee shall be and is considered salt water, and that the taking of fish therefrom is subject to the restrictions imposed by the Act or otherwise. What is intended by the phrase "or otherwise"?

To Hon. W. A. Rostn, Arcade Building, Arcadia, Florida:

There is some question as to what the Legislature may have intended by the phrase "or otherwise". By that I mean whether or not the taking of fish from Lake Okeechobee, except black bass, was to be governed entirely by the law relating to salt water fish, or whether the law relating to the taking of fresh water fish might also be applicable in certain instances. I am of the opinion, however, that the taking or selling of fish, caught in Lake Okeechobee, is governed by the law relating to salt water fish.

SALT WATER FISHERIES

July 1, 1941.—041-357.

LICENSES—ALIENS

QUESTION: Under Chapter 19611, Acts of 1939, in making application for wholesale or retail sea food dealer's license, who would be termed an alien?

To Hon. S. E. Rice, Supervisor of Conservation:

The term "alien", as used in Chapter 19611, Acts of 1939, applies to those persons who owe allegiance to some foreign country. In other words, it is applicable to all persons who are not citizens of the United States.

SALT WATER FISHERIES

April 8, 1941.—041-185.

LICENSES—CONCH SHELL DEALERS

QUESTION: Should the Supervisor of Conservation collect a wholesale license from persons handling conch shells, or other sea shells, who sell any of such products to wholesale dealers, retail dealers, or to hotels, restaurants, etc., as described under Section 2, Chapter 19611, Laws of 1939?

Should the Supervisor of Conservation collect a retail license from persons handling conch shells or other sea shells when sold direct to consumer as described under Section 3 of said Chapter?

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To Hon. S. E. Rice, Supervisor of Conservation:

Our Supreme Court has ruled that Chapter 19611, Laws of Florida, 1939, to which you refer, is applicable only to wholesalers and retailers in salt water food products, that it does not include the dealing in sponges as sponges are a salt water product but not a food product.

It is my opinion, in view of the holding in the above case, that dealers and/or wholesalers of conch shells or other sea shells are not subject to the license tax provided in Chapter 19611, Laws of Florida, 1939.

In order that you will not misunderstand my opinion, I draw this example, to-wit: Curio shops, for instance, selling or handling conch shells are not subject to the license tax. If the conch or the sea shell fish is being handled or dealt in as food, then the said Chapter is applicable.

SALT WATER FISHERIES

April 8, 1941.—041-186.

LICENSES—EXEMPTION TO WAR VETERANS

QUESTION: Are World War Veterans or any others exempt from paying a dealer's license under Chapter 19611, Laws of Florida, 1939?

To Hon. S. E. Rice, Supervisor of Conservation:

It is my opinion that the tax that is provided in Chapter 19611, Laws of Florida, 1939, is a license tax and not an occupational tax, for the reason that an occupational tax is one that is levied or exacted for the purpose of raising revenue for State or County purposes. You will observe from the reading of Section 1 of said chapter that the proceeds derived by the Supervisor of Conservation from the issuance of licenses shall be deposited in the State Treasury to the credit of the Conservation Fund for the use of the Conservation Department.

The Act which exempted disabled Veterans from the payment of an occupational tax is Chapter 17476, Laws of Florida, 1935, and there is some doubt in my mind as to what the Act intended. That is, was the Act intended to exempt Veterans only from the payment of an occupational tax, as one is led to believe in the reading of the title of the Act, or was it intended to exempt these Veterans from the payment of any tax, be it a license or an occupational tax? In the reading of the first section of this chapter, Chapter 17476, Acts of 1937, you will observe that it provides for the Veterans to be granted a license to engage in any business or occupation in the State of Florida. I also call your attention to Chapter 18011, Laws of Florida, 1937, and in particular to Section 35 thereof, which provides:

"Fees or licenses paid to any board, commission or office for permits, registration, examination, inspection or other regulatory purposes shall be in addition to and not in lieu of any occupational license tax required by this Act or other law unless otherwise expressly provided by law."

My predecessors in office have held that there is no exemption from the payment of dealers' or wholesalers' licenses provided for under Chapter 19611, supra, other than as specifically mentioned in said Act, and I concur in their opinion.

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SALT WATER FISHERIES

October 1, 1941.—041-562.

LICENSES—EXEMPTION TO WAR VETERANS

QUESTION: Is a former opinion holding that a disabled War Veteran is not entitled to claim exemption from payment of wholesale sea food dealer's license correct?

To Hon. S. E. Rice, Supervisor of Conservation:

This is to advise you that in my opinion my predecessor is eminently correct in the conclusions arrived at in such opinion, to-wit:

"That there are no exemptions from the payment of dealers' licenses provided for under Chapter 19611, Acts of 1939, other than such as are specifically mentioned in said Act."

These exemptions are set out in the proviso clause of Section 3, and are as follows:

Persons catching fish or sea food without the use of seines, nets, and traps, but using hook and line fishing, are not required to pay the retail dealer's license, even though they sell their own catch, nor are retail merchants selling fish, etc., who pay their retail mercantile license imposed by law for the handling of other products, required to pay this retail license.

SALT WATER FISHERIES

August 5, 1941.—041-427.

LICENSES—FEES—REFUND

QUESTION: (1) May the Conservation Department refund the moneys illegally exacted for a license to deal in salt water products, said license tax having been collected under Chapter 19611, Laws of Florida, Acts of 1939?

(2) May the Conservation Department refund moneys collected for a license under the provisions of Chapter 17917, Laws of Florida, 1937, and Chapter 19611, Laws of Florida, 1939, when the moneys so collected were paid through error and oversight by the licensee, the licensee having previously paid for such licenses and the latter payments amounting to a duplication?

To Hon. S. E. Rice, Supervisor of Conservation:

In my opinion, if the moneys so collected are still in the possession and under the control of the Conservation Department, you may refund such moneys. My reason for so ruling is because of the holding of our Supreme Court in the case of St. Johns Electrical Company vs. City of St. Augustine, 88 So. 387:

"As the ordinance prescribed a penalty by a fine of double the license tax for failure to pay the license taxes, it cannot fairly be said that the payment was voluntary, in the sense that its recovery is forbidden by a rule formulated by the courts, even though the ordinance under which it was paid has since been adjudicated to be invalid. Taxes are not voluntarily paid within the ruling that precludes a recovery, even if illegally exacted, where the failure to pay is a penal offense, and payment is made to avoid proceedings to enforce the penalty."

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SALT WATER FISHERIES

February 8, 1941.—041-50.

LICENSES—IMPOSITION BY MUNICIPALITY

QUESTION: May a municipality impose an additional license or occupational tax on wholesale or retail seafood dealers?

To State Board of Conservation:

A municipality may impose an occupational or license tax on wholesale or retail seafood dealers *provided* the charter act of the municipality was enacted subsequent to Chapter 6877, Acts of 1915, being Sec. 1836, C.G.L. and *provided further* that the grant of power in the charter act gave the municipality the authority to impose a license or occupational tax on enterprises of this particular classification.

I must condition my opinion on the two foregoing provisions for these reasons:

(1) That Sec. 1836 apparently repeals all general, special or local laws enacted prior thereto and in direct conflict.

"... A general act will not be held to repeal or modify a special one embraced within the general terms of the general act, unless the general act is a general revision of the whole subject, or unless the two acts are so repugnant or irreconcilable as to indicate a legislative intent that one should repeal or modify the other." *Sanders vs. Howell*, 74 So. 802.

(2) Where there is a conflict between the general law and special charter provisions included in a legislative act, it is well settled that the subsequent special charter provisions will prevail. (*City of Orlando vs. Evans*, 182 So. 265 and cases cited therein under second syllabus, page 267).

(3) The legislature has plenary power over municipalities. (Sec. 8, Art. VIII, of the Constitution of Florida, *City of Orlando vs. Evans*, supra.)

SALT WATER FISHERIES

February 25, 1941.—041-85.

LICENSES—SELLING SEA FOOD—CONSTRUED

QUESTION: Is a wholesale seafood dealer's license required of a person who catches his own fish by hook and line and sells to a retail seafood dealer?

To Board of Conservation:

Section 2, Chapter 19611, Acts of 1939, defines a wholesale seafood dealer to be:

"Any person . . . dealing in fish, seafoods, or salt water food products of any kind . . . who *sells* any of such products to wholesale dealers, retail dealers, or to hotels, restaurants, or other public eating places..."

Section 3 of said Chapter defines a retail seafood dealer to be:

"Any person, firm, or corporation, other than a wholesale dealer, or any wholesale dealer who deals in or sells fish, seafoods, or any salt

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water products . . . directly to the consumer." This section goes on to provide that the license hereby imposed shall not be required of persons catching fish or seafoods by hook and line method or gathering such products by hand and selling their own catch.

Under the clear and unambiguous wording of the statute, any person, firm or corporation, who sells fish to a wholesale dealer, a retail dealer, hotels, or public eating places, comes within the definition of a wholesale dealer, unless the person catches the fish with hook and line and sells directly to the consumer. It would seem that this law would, in some instances, work an absurdity but be that as it may, our Supreme Court has laid down certain rules in the construction of statutes, one being:

"Where the *language* of a statute is *plain and unambiguous* and admits of but one meaning, effect must be given to it accordingly and the courts in construing such statute, would not be justified in departing from the plain and natural meaning of the language used in order to supply *some supposed omission* on the part of the Legislature". (Board of County Commissioners vs. State of Florida, 118 So. 313; 96 Fla. 495).

"Where the language of a statute is *ambiguous or doubtful* in meaning, the courts may well look to the purpose and policy of the statute to elucidate and explain the meaning of the language used, but it is a well settled principle of construction that so long as the language used is unambiguous, a departure from its plain and natural meaning is not justified by any consideration of its consequences or of public policy. It is also well settled that where a statute is incomplete or defective because the case in question was not foreseen or contemplated, it is beyond the province of the courts to supply the omission, even though, as a result the statute appears unfair, impolitic or a complete nullity". (Board of County Commissioners vs. State, *Supra*).

It is my opinion that one who catches his own fish by hook and line is required to have a wholesale seafood dealer's license before he can sell to a retail seafood dealer.

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March 13, 1941.—041-132.

LICENSES—SPORT FISHING—LAKE OKEECHOBEE

QUESTION: Is a license required for sport fishing in Lake Okeechobee, and is a license required for the taking of bass or other fish?

To Hon. W. J. Hendry, Representative, Okeechobee County:

I call your attention to Section 11 of Chapter 10123, Acts of 1925 being Section 1875 C.G.L. This was an act to protect and regulate the salt water fishing industry in this state. This act was amended in 1935 by Chapter 17012 and I call your attention to Section 2-A thereof which provides:

"For the purpose of this act Lake Okeechobee and Doctor's Lake shall be and is considered salt water and fish, *except black bass*, may be taken at any time and used by the citizens of this state and persons not citizens thereof *subject to the restrictions and reservations herein imposed by this act or otherwise.*"

It is my opinion that all fish in Lake Okeechobee *save and except black bass*, are now classed as salt water fish and the fishing for same is regulated by the statutes pertaining to salt water fishing.

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I do not know of any provision of the law which requires a license for sport fishing in salt waters. The fishing for black bass in Lake Okeechobee is regulated by the statutes pertaining to fresh water fishing.

I call your attention to Chapter 19460, Acts of 1939 which was a population act providing that there should be *no closed season for fishing with hook and line* in the waters of any county in the State having a population of not more than 3,495 and not less than 3,470 according to the last State census. If my information is correct, the 1935 State census, being the last State census of Okeechobee County, is given as 3,484 which would leave an open season for fishing in that part of Lake Okeechobee which is within the boundaries of said county.

SALT WATER FISHERIES

October 23, 1941.—041-612.

LICENSES—WHOLESALE AND RETAIL DEALERS

QUESTION: (1) Should the Supervisor of Conservation attempt to exact wholesale and retail sea food dealers' licenses from persons in Levy, Dixie, Taylor, Jackson, Wakulla, and Franklin Counties who would be subject to such licenses, except for the provisions of Chapter 21093, Acts of 1941?

(2) Should the Supervisor of Conservation disregard the provisions of Chapter 21093, *supra*, because of its obvious unconstitutionality and exact licenses from such persons and, in case of their failure to comply with such orders, arrest the same; or should a proceeding be instituted to test the constitutionality of Chapter 21093, and if so, by whom?

To Hon. S. E. Rice, Supervisor of Conservation:

(1) Be governed by the provisions of said Chapter 21093 until a court of competent jurisdiction holds same unconstitutional or inapplicable, because our Supreme Court has said:

"It is further true that a ministerial or executive officer of the government has no authority or right to decline the performance of purely ministerial duties which are imposed upon him by statute solely upon the ground that such officer believes that the statute violates or contravenes the Constitution, because all statutes are presumed to be, and must be treated and acted upon by ministerial officers as constitutional and legal until their unconstitutionality or illegality has been judicially established." (*White vs. Crandon*, 156 So. 303, 305).

(2) That the constitutionality of this Act, Chapter 21093, *supra*, be tested by mandamus proceedings instituted by: (a) me as Attorney General, or (b) someone who has a special interest or right in himself other than the status of resident, citizen, and taxpayer. For example, some person who has paid the license as required by Chapter 19611, Laws of Florida, Acts of 1939, and who either carries on his sea food business in one of these counties specified in Chapter 21093, or who is in direct competition with the sea food dealers in one or more of the counties specified in said Chapter 21093.

My reason for so advising in 2 (a) and 2 (b) is because our Supreme Court has said:

"... It is indispensable to relator's right to maintain such an attack by a proceeding in mandamus, that he exhibit some special or particular right in himself other than such as attaches to him in his status as a

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resident, citizen and taxpayer of the county . . ." (State of Florida ex rel Crim vs. Juvenal, 159 So. 663).

" . . . To the Attorney General of the state is committed the authority to institute proceedings to call in question in the interest of the general public any questionable performance of official duty on the part of state or county officers alleged to be acting under statutes that are either inapplicable or *unconstitutional*." (State of Florida ex rel Crim vs. Juvenal, supra). (Emphasis supplied).

" . . . even though it appeared that the relator herein were a citizen of this state, we think the proceedings for mandamus should have been instituted by the proper public officer. The true distinction seems to be that, if the general public as distinguished from the state in its sovereign capacity is affected, any member of the state may sue out the writ; yet where the right or duty in question affects the state in its sovereign capacity as distinguished from the people at large, the proceedings must be instituted by the proper public officer." (Nickelson vs. State ex rel Blitch, 57 So. 194).

"There is no doubt that, where the writ of mandamus is sued out to require the performance of a definite duty to the public, the proceedings must proceed in the name of the State as plaintiff." (Bryce vs. Burke, Ala. 55 So. 630).

If the mandamus proceedings are instituted by someone other than me in my official capacity, I further advise you to consult with me concerning the proposed relator that you have in mind to institute such proceedings, so that I may determine whether or not he is qualified to do so.

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January 8, 1942.—042-13.

LICENSES—WHOLESALE AND RETAIL DEALERS

QUESTION: What license is required, if any, of a person selling sea food to hotels and restaurants when such sea food is caught by said person by hook and line fishing or some other hand method, not by seine, trap, or net?

To Hon. Chester B. McMullen, State Attorney, Court House, Clearwater, Florida:

In my opinion, if a person sells sea food to a hotel or restaurant, regardless of whether or not he is selling his own catch or how the sea food has been caught, such person must have a wholesale dealer's license. (Sec. 2, Chap. 19611, Laws of Florida, 1939).

Further, if such person sells sea food, which he has caught by hook and line fishing or some other hand method not by seine, trap, or net, and sells his catch directly to the consumer, he is not required to have either a wholesale or retail license.

It is further my opinion that if a person sells sea food to the consumer which he has not caught by his own hands or has caught by net, trap, or seine, he is required to have a retail dealer's license. (Sec.3, Chap. 19611, supra).

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SALT WATER FISHERIES

July 28, 1941.—041-406.

MULLET—CLOSED SEASON

QUESTION: Has the Board of Conservation authority to declare a statewide closed season on mullet, as a part of the conservation program in the present emergency?

To Hon. S. E. Rice, Supervisor of Conservation:

I can find no delegation of power to the Board of Conservation to regulate the seasons for the taking of fish, and it is my opinion, therefore, that you do not have such authority.

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June 15, 1941.—041-335.

NETS—GILL—REGULATIONS

QUESTION: Do the provisions of Chapter 20529, Acts of 1941, conflict?

To Hon. S. E. Rice, Supervisor of Conservation:

The 7th line of Sec. 1 of page 2 of the typewritten bill provides:

“... gill nets shall not be less than 2½ inch bar or 5-inch stretched mesh ...”

On the 11th line of said section on said page it provides:

“Gill or trammel nets of not less than three (3) inches stretched mesh may be used ...”

The two provisions are in direct conflict and, in view of this, it is my opinion that the latter provision will prevail; that is, it is unlawful to use a gill net of less than three inches stretched mesh.

The other apparent conflict is to be found in the last part of the 2nd paragraph of Sec. 1 on page 2, which prohibits the catching of any fish, except by the hook and line or rod and reel method, in those certain waters between the 1st day of April and the 1st day of June of each year, except shad and herring, and also excepting that mullet may be caught during this season from the St. Johns River Memorial Bridge at Palatka north to the mouth of said river, with the last paragraph of that section on page 3, which prohibits the catching of any fish, except by hook and line or rod and reel during this same period in those same waters, except shad and herring.

In construing the apparently conflicting provisions, it is my opinion that, in view of the fact the Legislature specifically permitted the catching of mullet in the last part of paragraph 2 of Sec. 1, while the last paragraph of this section only excepts shad and herring, the Court would construe the former provision to prevail. I reach this conclusion from the ruling of our Supreme Court in the case of Hall vs. State 39 Fla. 637, 674.

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SALT WATER FISHERIES

July 7, 1941.—041-366.

NETS—ILLEGAL—SEIZURE AND DISPOSITION

QUESTION: (1) Under Section 22 of Chapter 17930, Acts of 1937, should an illegal net be confiscated and retained by the sheriff pending trial of the case where the case may be set for hearing at a later date?

(2) Could the net be returned to the owners claiming same if a bond should be put up by the owners for the return of the net pending the trial outcome?

(3) Should the actual owner or owners of the net be arrested also after the person or persons fishing the illegal net have been arrested and have named the actual owners?

To Hon. S. E. Rice, Supervisor of Conservation:

(1) The Sheriff shall seize the illegal nets and hold the same pending the outcome of the trial.

(2) The nets are not subject to being returned to the rightful owners upon the posting of a bond.

(3) The owner or holders of nets are guilty of a misdemeanor if nets owned by them are used to take fish contrary to the provisions of said chapter.

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September 17, 1942.—042-454.

NETS—LEGAL SIZE

QUESTION: In reference to Section 371.10, Florida Statutes, 1941, What is the smallest stretched mesh that may be legally used in the St. Johns River south to Volusia Bar for taking or catching fish, shrimp, or any type of sea food?

To Hon. S. E. Rice, Supervisor of Conservation:

Section 1, Chapter 20529, Acts of 1941, provides in part as follows:

"No pound, square net, trap or set device, such as are commonly used, shall be fished with less than three (3) inches stretched mesh, except that nets of smaller mesh may be used on grounds designated by the Commissioner of Conservation for catching herring."

You will note that the above portion of said chapter refers to the Commissioner of Conservation as the authority for designating grounds where nets of smaller mesh may be used for catching herring.

The above section also provides in part as follows:

"Gill or trammel nets of not less than three (3) inches stretched mesh may be used during open season on other commercial fish."

The above section also provides that:

". . . nets of a less size may be fished for herring and shad and other commercial fish on established shad and herring hauls, after being designated by the Board of Conservation."

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In the above quoted portion, you will note the authority for using a net of smaller size on established shad and herring hauls is vested in the Board of Conservation. It, therefore, appears that there is a discrepancy in whom the authority is vested when designating grounds upon which smaller nets can be used.

Chapter 16178, Acts of 1933, Section 1, created the State Board of Conservation, which membership is composed of the Governor, the Secretary of State, the Attorney General, the Comptroller, the State Treasurer, the Superintendent of Public Instruction, and the Commissioner of Agriculture.

Section 2 of said Act provides that all duties, powers, and authority vested in the State Geologist, the Shell Fish Commissioner, and the State Game Commissioner, at the time of the passage of the Act, shall be vested in the Board of Conservation, except the power of appointing and employing such help, assistants, and agents as are necessary to carry out the provisions of the Act shall be vested in the Governor; and all duties, powers, and authority relating to the above-mentioned departments or officers vested in the Governor and the Commissioner of Agriculture at the time of the passage of the Act shall be vested in the Board of Conservation except that the Governor shall appoint the Supervisor of Conservation who shall be the administrative head of all work under the board and the Supervisor shall employ and appoint all other help, assistants, and agents as may be deemed necessary by the Governor.

Section 7 of said Act authorizes the State Board of Conservation to make reasonable rules and regulations for carrying out the purposes of this Act and of other laws relating to the powers and duties of said Board.

It is, therefore, my opinion that the smallest size fish net that is commonly used shall not be less than three (3) inches stretched mesh, except that nets of smaller mesh may be fished for herring and shad and other commercial fish on established shad and herring hauls after being designated by the Board of Conservation, but not otherwise, and also nets of smaller mesh than three (3) inches may be used on grounds designated by the Board of Conservation for catching herring.

Since the Act creating the Board of Conservation states that all duties and powers are vested in the Board of Conservation, and that the Supervisor shall be the administrative head of all work under the board, it is my opinion that the Board of Conservation shall by its action determine the smallest size fish net that shall be used in accordance with the two sections referred to, and that when reference is made to the Commissioner of Conservation it is my opinion that the Act intended to mean the Board of Conservation as said Act abolished the Commissioner and placed in lieu thereof the Board of Conservation with a Supervisor who shall be the administrative head of the Board of Conservation and the Acts set forth what powers the Supervisor shall have. Bouvier spoke of "administrative" as one in which nothing is left to discretion.

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May 29, 1942.—042-267.

SPONGES—COMMERCIAL—SIZE

QUESTION: Is the possession of sponges measuring when wet less than five inches in maximum diameter a violation of Section 8084, Compiled General Laws of 1927, or is it necessary for a conservation agent to prove where sponges were obtained?

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To Hon. S. E. Rice, Supervisor of Conservation:

It is my opinion that it is in violation of Section 8084, Compiled General Laws, 1927, for any person, persons, firm or corporation to have possession of any commercial sponges measuring when wet less than five inches in their maximum diameter, and for your information I quote you Section 8084, Compiled General Laws, 1927:

"It shall be unlawful for any person, persons, firm or corporation to take or catch by any means or method in the waters of the Gulf of Mexico, or the Straits of Florida, or other waters within the territorial limits of this State, any commercial sponges measuring when wet less than five inches in their maximum diameter, or for any person, persons, firm or corporation to land, deliver, cure, offer for sale or have possession of at any port or place or upon any boat or vessel any such commercial sponges."

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January 8, 1942.—042-12.

STONE CRABS—TRAPPING

QUESTION: (1) Does a person violate the provisions of Chapter 21487, Special Acts, Laws of Florida, 1941, when such person traps or attempts to trap stone crabs in the Gulf of Mexico or adjacent bays, lying within the County of Pinellas, when such waters do not lie due north of Indian Rocks Bridge; in other words, the trapping or attempting to trap is in the waters of the Gulf of Mexico or adjacent bays north of the east-west center line of said bridge, but lying in an easterly direction therefrom?

(2) Is there any prohibition contained in Chapter 21487, Special Acts, Laws of Florida, 1941, on the catching of stone crabs in the waters of the Gulf of Mexico and adjacent bays lying north of Indian Rocks Bridge, save and except against the method of trap or traps?

To Hon. Chester B. McMullen, State Attorney, Court House, Clearwater, Florida:

(1) It is my opinion that such person is violating the provisions of Chapter 21487, supra, because it would be a most strained construction of the Act to hold that the prohibition only applied to a strip of water equal in width to the width of Indian Rocks Bridge and lying due north therefrom.

(2) It is my opinion that Chapter 21487, supra, only prohibits the catching of stone crabs in such waters by the trap method; in other words, said chapter does not prohibit the catching of stone crabs by hook and line or by any other method which does not constitute a trap.

SALT WATER FISHERIES

June 18, 1941.—041-337.

TROUT—SEASON—REGULATION

QUESTION: The closed season on salt water trout is from June 15 to July 15, and such closed season serves no conservation purpose for the reason that the trout spawn between May 1 and June 1. Is the supervisor of Conservation acting within his rights in declaring no closed season on salt water trout?

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To Hon. S. E. Rice, Supervisor of Conservation:

The law provides that the closed season is between the dates as stated in your letter, to-wit: June 15 and July 15, and it is my opinion that your declaring said period of time to be an open season for the taking of salt water trout is of no effect, the Legislature having determined by duly enacted law the closed season for the taking of this class of fish.

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May 20, 1941.—041-273.

TURTLES—SHIPMENT

QUESTION: May loggerhead or green turtles be shipped and handled by transportation companies during the months of May, June, July and August of any year?

To Hon. S. E. Rice, Supervisor of Conservation:

I call your attention to Section 8038, C.G.L., which provides:

"It shall be unlawful for any person or persons, firm or corporation to take, kill or mutilate or in any wise destroy any loggerhead or green turtle while any such turtle is laying or found out of the waters or upon the beaches of the State of Florida during the months of May, June, July and August of any year. Any person violating the provisions of this section shall be punished by a fine not to exceed one hundred dollars or imprisonment in the county jail not to exceed sixty days, or both such fine and imprisonment, in the discretion of the court."

You will observe from the foregoing provision that the prohibition is on the taking, killing or mutilating of such turtles while the same are laying or found out of the waters or upon the beaches. You will further observe that the foregoing section is a penal statute and a strict construction is always placed on statutes of such a nature. It is my opinion, therefore, that there is no law prohibiting the shipment or transportation of loggerhead or green turtles during the months of May, June, July or August of any year.

CHAPTER XXI

PUBLIC HEALTH

STATE BOARD OF HEALTH

August 7, 1941.—041-436.

AUTOMOBILES—DISPOSITION—PROCEDURE

QUESTION: What is the proper procedure for the State Board of Health to follow in disposing of passenger automobiles purchased by the Board?

To Dr. W. H. Pickett, State Health Officer, State Board of Health:

When automobiles have become obsolete or no longer useful to the Board, I see no reason why the Board cannot dispose of them. It isn't necessary that notice of the proposed sale be published although as a matter of public policy I recommend either that such publication be had or at least that several bids be received in order that the automobiles may be sold at a fair and reasonable price. The amount received for each car should be deposited with the State Treasurer as a credit to the fund from which the original purchase of that car was made.

STATE BOARD OF HEALTH

July 25, 1941.—041-401.

DEAD BODIES—TRANSPORTATION REGULATIONS

QUESTION: Does the second sentence of Rule 3 of the rules promulgated by the State Board of Health, governing the transportation and disinterment of dead bodies, apply whether the body is to be transported by common carrier or merely removed from its place of keeping; also does it apply to "any body removed from any place of reception, by vault or other structure, if retained therein for more than 18 hours"?

To Dr. Edward M. L'Engle, Director, Bureau of Vital Statistics, State Board of Health:

Rule 3 reads as follows:

"The bodies dead from any cause not specified in Rule 2 shall be accepted for transportation only when encased in a sound coffin or casket and enclosed in a strong outside wooden box or metal vault; provided, that the body will reach its destination within eighteen (18) hours from time of death. If the body cannot reach its destination within eighteen (18) hours from the time of death, then the body must be prepared as provided by Sections (a) and (b) of Rule 2. The outside case may be omitted in all instances when the coffin or casket is transported in hearse or funeral director's vehicle."

You state that Sections (a) and (b) of Rule 2 require embalming and that the purpose of the Rule is to provide that a dead body at the time of burial will not show decomposition.

In my opinion the second sentence of Rule 3 contemplates transportation by any vehicle, whether by common carrier or otherwise, but

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I do not think that the mere removal of a body from a place of reception to a point a short distance away, as within the same registration district, is contemplated by that portion of the Rule.

STATE BOARD OF HEALTH

December 10, 1941.—041-702.

DENTAL LAWS—ENFORCEMENT

QUESTION: May the State Board of Health or the Bureau of Narcotics of the State Board of Health take over enforcement of the dental laws of Florida?

To State Board of Health:

There is no statute authorizing or directing the State Board of Health or the Bureau of Narcotics of the State Board of Health to take over the enforcement of the dental laws. It would seem possible, however, for the Secretary-Treasurer of the Florida State Board of Dental Examiners under Section 12 of Chapter 20240, Laws of Florida, Acts of 1941, to employ as the Assistant Secretary-Treasurer a person who is also employed by the State Board of Health, if the State Board of Health and the person in question are agreeable to this arrangement. The Section in question reads as follows:

"The Secretary-Treasurer of the Board, with the consent of the Board, shall have the power to employ at his pleasure an Assistant Secretary-Treasurer, who need not be a member of the Board nor a practicing dentist. The Assistant Secretary-Treasurer shall, in the name of the Secretary-Treasurer, be qualified to perform any of the duties of the Secretary-Treasurer in matters pertaining to the gathering of evidence in any violation of any of the provisions of this Act, swearing out warrants, appearing before courts in prosecutions, and any other matters pertaining to the enforcement of the provisions of this Act, but said Assistant Secretary-Treasurer shall not be entitled to receive any witness or other fees out of the fine and forfeiture fund of any county on account of his testifying as a witness or any other services rendered by him under this Act."

Under this statute the Assistant Secretary-Treasurer so employed would be authorized to perform the functions enumerated to assist in the enforcement of the provisions of Chapter 20240, Acts of 1941.

STATE BOARD OF HEALTH

August 20, 1942.—042-405.

FEDERAL GRANTS—DETENTION HOSPITALS

QUESTION: Does the State Board of Health have the legal authority to maintain and operate a quarantine or isolation hospital for the detention and treatment of infected prostitutes, and, if so, may the State Board of Health receive an allotment of Federal funds to be used in the operation and maintenance of such quarantine and isolation hospital?

To Federal Works Agency, Washington, D. C.:

The statutes of Florida authorize the State Board of Health to make, adopt, promulgate and enforce rules and regulations covering sanitation and quarantine as may be necessary for the protection of the public

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health, which regulations so established shall be known as the Sanitary Code of the State of Florida (Section 381.49, Florida Statutes 1941).

Regulation 21 of the Sanitary Code so adopted provides as follows:

Regulation 21: Gonorrhea—Syphilis—Tuberculosis.

"A person affected with or presumably affected with one of the diseases mentioned in this regulation shall when necessary for the protection of the public health be isolated or restricted in accordance with statute law and specific regulations of the sanitary code."

Regulation 25 of said Sanitary Code provides:

"Regulation 25: When in the opinion of the health officer proper isolation or quarantine of an affected person, persons, carrier, or contact is not or cannot be effectively maintained on the premises occupied by such person or persons by methods designated in this code, he may remove or require the removal of such person or persons to a hospital or other proper place designated by him; or he may employ such guards or officers as may be necessary to maintain effective isolation or quarantine."

Regulation 40 of said Sanitary Code provides:

"Regulation 40: Syphilis, gonorrhea, chancroid, granuloma inguinale, and lymphogranuloma venereum are hereby designated as venereal diseases and are declared to be contagious, infectious communicable diseases and dangerous to the public health."

Regulation 45 of said Sanitary Code provides:

"Regulation 45: If any person or persons suspected of being infected with a venereal disease should refuse to voluntarily submit to examination, the health officer shall, in that event, follow the procedure set forth in Sections 3949 and 3951 of the Compiled General Laws of Florida (1927), that where such person or persons suspected of being infected are reputed to be promiscuous source or sources of infection, the health officer shall take immediate steps to isolate such person or persons or quarantine the house or premises of such person or persons."

Regulation 49 of said Sanitary Code provides:

"Regulation 49: Any person afflicted with a venereal disease who fails or refuses to undergo proper treatment for the disease shall be isolated or quarantined for the period during which the patient refuses treatment, or until the health officer is satisfied that he is no longer capable of disseminating infection."

Regulation 55 of said Sanitary Code provides:

"Regulation 55: The health officer is authorized and directed to isolate or quarantine a person who has or is suspected of having a venereal disease, whenever, in the opinion of the health officer, isolation or quarantine is necessary for the protection of the public health. In establishing isolation or quarantine, the health officer shall designate and define the limits of the area in which the person known to have a venereal disease and his immediate attendants are to be isolated or quarantined and no persons other than the attending physician shall enter or leave the area of quarantine without the permission of the health officer. No one but the health officer shall terminate said isolation or quarantine and this shall not be done until the diseased person has become non-infectious, as determined by the health officer through clinical examination and

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all necessary laboratory tests, or for other sufficient reason the health officer shall deem it proper to sooner terminate said isolation or quarantine."

Regulation 56 of said Sanitary Code provides:

"Regulation 56: When the person whose name is reported is known to be a prostitute or pimp, or to be engaged in any way in commercialized vice, it may be assumed that such person can not be trusted to protect others from exposure or infection, and it is the duty of the health officer to take immediate steps to isolate or quarantine such person without waiting to interview either the physician or the patient. In all other cases where isolation or quarantine is instituted, the health officer should satisfy himself as to the accuracy of the diagnosis."

The foregoing regulations of the Sanitary Code, together with the statutes of this State, authorize the State Board of Health to isolate persons having a venereal disease, designate and define the limits of the area in which such persons are to be isolated, and treat them at public expense. Having power and authority to isolate such persons and treat them at public expense, it is my opinion that the State Board of Health has the power to maintain and operate quarantine or isolation hospitals for that purpose, and may receive an allotment of Federal funds to be used in the operation and maintenance of such isolation and quarantine hospitals, provided said allotment is a grant rather than a loan.

STATE BOARD OF HEALTH

December 10, 1941.—041-671.

March 3, 1942.—042-102.

FEDERAL GRANTS—REPAYMENT WITH STATE FUNDS

QUESTION: (1) Is the State Board of Health authorized to enter into a contract with the P.W.A. for the construction of a laboratory-engineering building? The building is to cost \$160,000.00—the Federal government advancing the entire amount. They are to give as an outright grant \$70,000.00 leaving \$90,000.00 to be paid by the State. It has been suggested by the P.W.A. that this \$90,000.00 be amortized at 3% interest over a period of 10 years by equal annual payment of \$10,550.00. They ask that the State Board of Health, if the project is approved, pass a resolution calling for payment of \$10,550.00 each year, the resolution to contain a clause signifying that the agreement will be renewed each year until amortization. An option would be attached giving the Board the opportunity to pay out the entire amount due at any time and save interest.

(2) Would the laws be interpreted differently if Federal funds instead of State funds were used to amortize this proposed loan?

To State Board of Health:

(1) I am unable to find any law of Florida which grants authority to the State Board of Health to carry out the described agreement so far as State funds are concerned.

(2) The Florida State Board of Health is not authorized to enter into this contract directly with the P.W.A.

By Chapter 15861, Laws of Florida, Acts of 1933, there was created a commission to be known as the "Florida Agricultural and Industrial

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Relief Commission." The name of this Commission was changed by Chapter 20509, Laws of Florida, Acts of 1941, to "Florida State Improvement Commission." The apparent purpose of these two Acts was to aid and assist counties, municipalities, political sub-divisions, boards and commissions of the State of Florida in securing from the Federal government loans or grants of money appropriated by Congress. The Florida State Improvement Commission is given authority to negotiate and accept loans and grants from the Federal government for public purposes.

It appears, therefore, that the Commission would be authorized to enter into a contract with the Federal government for the construction of the proposed building, provided the project is self-liquidating in character, and the State Board of Health could acquire the use and possession thereof by appropriate agreement with the Commission.

The benefit of the proposed grant from the Government will therefore have to be secured by the State Board of Health through the Florida State Improvement Commission.

STATE BOARD OF HEALTH

December 9, 1942.—042-583.

FEDERAL GRANTS—SANITATION PROJECTS—MILITARY AREAS

QUESTION: Have cities and counties of the state of Florida legal authority to accept Federal grants and contract pursuant thereto, for sanitation projects in emergency instances in connection with the war effort and can the State Board of Health legally enter into contracts covering the aforesaid work and receive Federal grants therefor?

To State Board of Health, Jacksonville, Florida:

I understand from your request that under the Lanham Act of the Federal Congress, the United States Public Health Service and the War Public Works Division of the Federal Works Agency have agreed upon a program to meet the acute sanitation emergency existing in military areas such as the Carrabelle-Apalachicola area, Panama City area, Green Cove Springs area, Tallahassee area, and some eight or ten additional such areas. This program, you say, is to protect the health of the military, naval, and war industrial personnel in specific areas outside water and sewerage districts in the vicinity of war establishments by providing the fundamental sanitary facilities required, and I understand the program is to be financed entirely by Federal grants.

Under the program outlined by you, the city or county having jurisdiction in the area involved will sponsor the application for War Public Works emergency sanitation projects, and the sanitary improvements will be carried out in accordance with the laws, specifications and regulations of the State Board of Health.

The State Board of Health, under Sections 381.43 to 381.50 inclusive, of Florida Statutes 1941, has supervisory control and regulatory powers over the water supply, sewerage, refuse, and the disposal of excreta, sewerage disposal or other wastes throughout the State, and may make such rules and regulations covering sanitation as may be necessary for the protection of the public health.

Further, the State Board of Health, by Section 318.45, Florida Statutes 1941, is charged with the duty of consulting with and advising the authorities of cities and counties concerning the water supply and the

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disposal of drainage, sewage and refuse with reference to existing and future needs of such communities.

Likewise, the State Board of Health, upon finding that any water supply, sewerage, waste or refuse disposal system is in any way a menace to health, is authorized to issue an order requiring the owner of such system to correct the improper conditions. (Sections 381.46, Florida Statutes 1941).

Municipalities are authorized to pass all laws and ordinances which may be necessary for the preservation of the public health. (Section 167.05, Florida Statutes 1941).

The statutes authorize the organization and operation of local health units under the supervision and control of the State Board of Health in counties and cities for the control and eradication of preventable diseases and for inculcating modern scientific methods of hygiene, sanitation, and the prevention of communicable diseases. The county commissioners are authorized to agree with the State Board of Health upon the expenditure by the State Board of Health in such counties of any funds allocated for that purpose by the State Board of Health or received by it for such purposes from private contributions or other sources. The State Board of Health is further authorized to arrange and agree with the United States Government through its duly authorized officers for the allocation and expenditure by the United States of funds of the United States in the study of causes of diseases and prevention thereof in such full time local health units when and where established by the State Board of Health. (Chapter 154, Florida Statutes 1941).

Boards of county commissioners of the several counties of the state of Florida, whenever it may be necessary to meet the requirements of the United States Government with reference to obtaining grants of Federal funds in connection with the program of Public Works Administration, may by resolution of such board transfer and expend such sums of money as may be necessary to obtain said grant, provided such transfers are approved by the State Comptroller and the County Budget Commission where one exists. (Section 218.06, Florida Statutes 1941).

The 1941 appropriations bill, in Section 6 thereof, provides that Federal money appropriated by the Congress of the United States to be used for state purposes, whether by itself or in conjunction with moneys appropriated by the Legislature of the State, is re-appropriated as far as it may be necessary to the purpose for which same was made available, and in so far as the same is permitted by the Federal Statutes.

Thus we see that the State Board of Health, the several counties, and the municipalities, have the responsibility of preserving the public health, and are charged with cooperating to that end.

We also see that many statutes have been enacted with reference to the acceptance and use of Federal grants.

In addition to all this, I can find no prohibition against acceptance of Federal grants by counties, municipalities, or state agencies, where such grants are outright gifts and do not impose any liability upon the finances of the recipient thereof.

It is, therefore, my opinion that:

(1) Cities and counties of the state of Florida have the legal authority to accept Federal grants and contract for sanitation projects outlined by you to be carried out in accordance with the regulations of the State Board of Health.

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(2) The State Board of Health has the legal authority to accept Federal grants and agree with the various boards of county commissioners for their expenditure through the local health units in carrying out the sanitation projects outlined by you.

STATE BOARD OF HEALTH

May 6, 1941.—041-235.

HEALTH OFFICER—DELEGATION OF AUTHORITY

QUESTION: May the State Health Officer delegate the authority of that office to the City Health Officer so that he may quarantine syphilis and gonorrhea?

To Dr. W. H. Pickett, State Health Officer, Jacksonville, Florida:

Section 3145, Compiled General Laws, Permanent Supplement, Vol. 3, provides for your appointment in this language:

"It shall be the duty of the Governor to appoint a physician . . . which said person shall be known as the State Health Officer. The State Health Officer shall be the Executive Officer of the Board and Secretary of the same . . ."

Section 3951 of the Compiled General Laws of 1927 provides:

"State, County and Municipal Health Officers or their authorized deputies, within their respective jurisdictions, are hereby directed and empowered, when in their judgment it is necessary to protect the public health . . . to isolate persons infected with a venereal disease . . ."

It is therefore apparent that you, as State Health Officer, have the authority under Section 3951, to appoint a deputy to isolate persons infected with a venereal disease, and I know of no reason why you cannot appoint Dr. Upchurch as your deputy in that regard.

STATE BOARD OF HEALTH

July 8, 1941.—041-370.

LABORATORY SERVICE—PHYSIOTHERAPIST

QUESTION: Would one registered and holding a license as a physiotherapist be entitled to receive the laboratory service furnished by the State Board of Health to Doctors of the different schools of medicine?

This question involves the case of *State ex rel Turner vs. Baltzell*, 197 So. 783.

To State Board of Health:

The opinion in the case of *State ex rel Turner vs. Baltzell et al.*, 197 So. 783 involved those physicians practicing naturopathy and it was particularly stated in the opinion that naturopathic practice is licensed and recognized by the law of this State.

I am unable to find any recognition, in our law, of physiotherapy as constituting within itself one of the recognized schools of medicine. There is, so far as I am able to ascertain, no regulation of the practice of physiotherapy in the State of Florida.

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The statutes of this State do recognize physiotherapy as one of the courses of study required of students in legally chartered osteopathic colleges.

Physiotherapy is recognized in some states, for example, the State of New York where it is defined to be the use of actino-therapy, hydro-therapy, mechanotherapy, thermotherapy, and electrotherapy, exclusive of the X-ray. In that State, a duly licensed physician may use such modalities but the licensed physiotherapist may not engage in the independent use thereof but practices under the supervision of a duly licensed physician.

One who denominates himself a physiotherapist and holds out to the public that he is able, through the practice of physiotherapy to treat and cure or relieve human diseases or injuries is in fact, in my opinion, practicing the healing art. But, the law of this State does not recognize his particular specialty as one of the separate schools of medicine.

A physiotherapist is, in my opinion, in much the same situation as a regular medical doctor who follows some specialized practice. For example, an oculist practices as such under his authority to practice as a regular medical doctor, his specialty not being recognized as constituting, alone, one of the schools of medicine. The physiotherapist of Florida, therefore, is specializing in one branch of the Osteopathic School of Medicine or else he is practicing as a regular medical doctor, specializing in physiotherapy.

Therefore a physiotherapist, as such, is not entitled to the laboratory service rendered by your Board. If, however, he is duly licensed as a practitioner of a school of medicine recognized by the laws of this State and, as such, is specializing in physiotherapy, then, as a licensed practitioner of the recognized school of medicine, he is entitled to such laboratory service, but, in that capacity, only, and not as a physiotherapist.

STATE BOARD OF HEALTH

March 19, 1942.—042-133.

**MEMBERS—LIABILITY FOR DAMAGES IN OPERATION
OF AUTOMOBILE**

QUESTION: If the operator of a personal car has an accident while traveling for the State Board of Health and causes damage to another car or person, and does not carry liability and property damage insurance, could the members of the State Board of Health be sued?

To State Board of Health:

The State Board of Health is a governmental agency of the State of Florida and its employees are State Employees. Any suit against the State Board of Health, or its members, as such for damages arising from an automobile accident had by an employee would, in effect, be a suit against the State of Florida, and there is no legal liability on the part of the State in such cases. Assuming that the term "personal car" as used in your question, quoted above, means the personally owned automobile of the operator, who is an employee of the State Board of Health, it is my opinion that the members of the State Board of Health are not liable for damages occasioned by the operation of such automobile.

Of course if the car is the personal car of a member of the State Board of Health and is being used by an employee and is involved in an

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accident causing damage, such member may or may not be individually liable, depending on the facts of the case.

But in either event there would be no liability on the part of the members of the State Board of Health as such.

STATE BOARD OF HEALTH

March 10, 1941.—041-122.

MERIT SYSTEM COUNCIL—APPOINTMENTS

QUESTION: Would the appointment of Dean Matherly to the Merit System Council, which will pass upon the promotion, demotion and appointment of all employees of the Florida Crippled Children's Commission and the State Board of Health, violate any State law?

To Dr. William H. Ball, Director of the Bureau of Maternal and Child Health, State Board of Health, Jacksonville, Florida:

Dean Walter J. Matherly is presently employed as Dean and head Professor of Economics at the University of Florida at a monthly salary of \$644.44.

Such employment does not constitute the holding of office as contemplated by Section 15, Article XVI of the Constitution, which provides that no person shall hold or perform the functions of more than one office under the government of this State at the same time.

There is a person presently employed as Director and Professor of Architecture in the School of Architecture at the University of Florida at a monthly salary of \$444.44. This same person is likewise presently employed as architect for the State Board of Control at a monthly salary of \$200.00.

There is another person who was until recently employed as Assistant Professor of Insurance and Realty Management in the College of Business Administration at the University of Florida, at a monthly salary of \$266.66. He was at the same time employed by the Florida Industrial Commission as Supervisor of Examinations under the Merit System of that Commission, at a monthly salary of \$150.00.

I point out the above situations not as having anything to do with the present question but as illustrative of the fact that there is a precedence for the proposed appointment of Dean Matherly.

The Act creating the Florida Crippled Children's Commission and amendatory Acts with reference thereto provide that:

"The Florida Crippled Children's Commission shall be a body corporate and shall have a corporate seal . . ."

"Said commission shall have the right to employ all necessary clerks, servants and employees not otherwise provided herein and shall have the right to formulate and adopt general policies and adopt an annual budget and plan . . ."

"Said commission shall have and possess all the powers of a body corporate for all the purposes created by or that may exist under the provisions of this law or any law or laws amendatory thereof."

(Chapter 13620, Acts 1929, Sec. 10, Chapter 19430, Acts 1939, Sec.4).

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The Act creating the State Board of Health provides that:

"The State Board of Health shall have the general supervision of the public health of the State of Florida and shall have power to make, promulgate and enforce such rules and regulations as may be necessary for the preservation of the same."

(Chapter 4348, Acts 1895, Sec. 2 amending Sec. 772, Revised Statute, 1892).

Broad powers are granted to the State Board of Health for the purpose of carrying out provisions of the Act and the preservation of the State health. Provision is made for defraying the expenses of the Board and while I find no specific statutory authority for employment of necessary personnel by the Board, I am of the opinion that the Board would have this authority since I find no statutory prohibition. It would be necessary in my opinion for the Board to exercise this authority in order to carry out the provisions of the Act creating the Board and relating to the preservation of the State health.

It is my conclusion that in view of the fact that the Florida Crippled Children's Commission and the State Board of Health do have authority, statutory or implied, concerning the employment of necessary personnel and the adoption of rules and regulations, they would have the authority to effect such employment through a Merit System, set up under the rules and regulations of said Board and Commission, provided, of course, the actual employment was done by the proper officers of said Board and Commission.

I am further of the opinion that the appointment of Dean Matherly to a position on the Merit System Council set up by the State Board of Health and Florida Crippled Children's Commission would violate no State law. I am assuming, of course, that Dean Matherly has not held political office, nor been an officer of a political organization, other than his connection with the University of Florida, during the year preceding his appointment, nor that he has been an employee or officer or board member of the Florida State Board of Health or Florida Crippled Children's Commission within one year prior to his appointment.

STATE BOARD OF HEALTH

April 17, 1941.—041-200.

MERIT SYSTEM COUNCIL—APPOINTMENTS—DUAL POSITIONS

QUESTION: May a member of the State Board of Pharmacy serve as a member of the Merit System Council? Neither position has a salary connected with it.

To Dr. W. H. Pickett, State Health Officer, Jacksonville, Florida:

The writer's attention has been called to an opinion of this office under date of March 10, 1941, in re: Validity of Proposed Appointment of Dean Matherly to the Merit System Council of the Florida Crippled Children's Commission and State Board of Health. You do not state whether or not this is the Merit System Council you have in mind. As you probably know, there is a statutory body known as the Merit System Council that was created at the same time as the Industrial Commission but I shall assume for the purpose of this opinion that the Council you refer to is the one referred to in my opinion of March 10 to the State Board of Health.

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I am of the opinion that a member of the State Board of Pharmacy is a State Officer under the meaning given the term "officer" by our Supreme Court in many cases. See *State vs. Jones*, 84 So. 84; *Dade County vs. State*, 116 So. 72; and *McSween vs. State Live Stock Sanitary Board of Florida*, 122 So. 239. I do not believe that the Merit System Council that has been set up under rules and regulations of the Board of Health and the Florida Crippled Children's Commission would have the effect of creating a State office within the meaning of the prohibition contained in Section 15 of Article XVI of our Constitution against the holding by one person of more than one office under the Government of this State at the same time, for the reason that this is not a statutory body and, therefore, it cannot have delegated to it any portion of the sovereign power of the State of Florida since this would require legislative action.

I, therefore, am of the opinion that it would be entirely proper for a member of the State Board of Pharmacy to also serve as a member of the Merit System Council set up by the State Board of Health and the Florida Crippled Children's Commission.

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April 29, 1941.—041-230.

MERIT SYSTEM COUNCIL—APPOINTMENTS—DUAL POSITIONS

QUESTION: May Professor Angus Laird serve as supervisor for the Merit System Council at a small salary, and at the same time serve as a Professor of Science at the University of Florida?

To Dr. W. H. Pickett, State Health Officer, Jacksonville, Fla.:

Under date of March 10th, 1941, I advised you that it would not be improper under the conditions mentioned, for a Professor at the University of Florida to serve upon your Merit System Council. See also my opinion to you under date of April 17th, 1941.

In view of these two opinions and knowing of no prohibition against the payment of a small salary to Professor Angus Laird, I, therefore, hold that it would be proper to compensate him for his services as Supervisor for your Merit System Council.

STATE BOARD OF HEALTH

November 1, 1941.—041-629.

PHYSICIANS—CERTIFICATE OF REGISTRATION

QUESTION: Should the Secretary of the Board of Health issue a certificate of registration to an applicant whose license to practice medicine has been revoked by the State Board of Medical Examiners but who has appealed this order of revocation? The applicant in making his appeal asked for a trial de novo and the Judge of the Circuit Court has issued an order granting a supersedeas of the order of the State Board of Medical Examiners pending the appeal.

To State Board of Health:

Under these circumstances and under the provisions of Section 3415 of the Compiled General Laws of 1927, it is my opinion that the certificate of registration should be issued at this time to this applicant in question.

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March 14, 1942.—042-130.

**RECORDS—FEES FOR SEARCH—PRESERVATION—AUTHORITY
TO DESTROY RECORDS**

QUESTION: (1) Can a small fee be charged by our Bureau of Laboratories for searching its files and issuing duplicate reports of examinations to physicians, clinics, industries and the like?

(2) Is there any stipulation as to the period of time for which records of results of examinations must be maintained by the Bureau of Laboratories, i. e., can records be destroyed after one year, two years, five years, etc., after date of examination?

To State Board of Health:

(1) It is my opinion that your Bureau of Laboratories is not authorized to charge a fee for searching its files and issuing duplicate reports of examinations, as public officers are not authorized to charge fees for services unless such fees are specifically provided for by law.

Rawls vs. State, 122 So. 222, State ex rel. Landis vs. Reardon, 154 So. 868.

(2) It is my opinion that these records are records of a public nature and should be preserved until such time as the Legislature, by statute, authorizes or directs their destruction.

STATE BOARD OF HEALTH

October 15, 1941.—041-597.

SANITARY AGENTS—ARRESTS

QUESTION: (1) Should Chapter 21445, Acts of 1941, relating to plumbing and drainage within a radius of one mile beyond the limits of the City of Orlando be regarded as constitutional?

(2) Has the State Board of Health authority to deputize certain sanitary personnel to arrest persons violating the sanitary code when the time element prevents the sanitary officers contacting a sheriff?

To State Board of Health:

(1) The Florida Supreme Court has long held that every Act of the Legislature is presumptively constitutional until judicially declared otherwise and that it is the duty of public officers to obey the statutes until in proper proceedings they are passed upon in court and declared invalid or inoperative. In view of this rule Chapter 21445 should be regarded as constitutional.

(2) Section 3150 of the Compiled General Laws provides:

"The State health officer, under the direction of the State board of health, shall have the general administrative and executive control of all the maritime and domestic quarantine systems of the State. He shall have the power to make arrests without warrants for any violation of the quarantine rules and regulations of the State board of health after they have been duly promulgated. He shall have power to deputize sanitary agents for that purpose. In all such cases the person or persons arrested for violating the quarantine and sanitary rules aforesaid

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shall be surrendered without delay to the custody of the nearest sheriff and formal complaint made against him, her or them, in accordance with law."

There is no set procedure for deputization under the terms of this Act but I suggest that a written order signed by the State Health Officer similar to the following would comply with the statute:

".....194.....

In accordance with the provisions of Section 1994 of the Revised General Statutes of 1920 (Section 3150, Compiled General Laws) I hereby deputize.....as a sanitary agent with power to make arrests without warrants for any violation of the duly promulgated quarantine and sanitary rules and regulations of the State Board of Health, the person or persons arrested for violating said rules and regulations to be surrendered without delay to the custody of the nearest sheriff and formal complaint made against them, her or him, in accordance with law.

State Health Officer of Florida."

This power to make arrests without warrants under Section 3150 may not, in my opinion, be exercised by the State Health officer and his duly deputized sanitary agents, except when the violation for which the arrests are made occurred in the presence of the arresting officer.

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March 21, 1942.—042-136.

SUPPLIES—PURCHASE

QUESTION: Is the State Board of Health required to purchase all supplies within the State of Florida, or may supplies be purchased direct from the manufacturer, rather than through the manufacturer's Florida representative, if a saving may thus be effected?

To State Board of Health:

I am unable to find any law requiring the State Board of Health to purchase its supplies within the State of Florida.

However, the Board of Commissioners of State Institutions has adopted the policy of purchasing all supplies for the institutions under its management and control within the State of Florida except in such cases where a saving of more than five per cent can be effected by making such purchases from out of the State.

Even though the State Board of Health is not required by law to do so, I believe that it should adopt this policy which is being followed by the Board of Commissioners of State Institutions.

Of course, if supplies of the required quality cannot be purchased within the State then you would be justified in securing them elsewhere.

BUREAU OF VITAL STATISTICS

September 22, 1941.—041-543.

BIRTH CERTIFICATES—POWER TO AMEND

QUESTION: A son was born of parents living together under an assumed name but who were not legally or formally married. In reporting

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the birth of this son the assumed name was given. Thereafter the parents were formally married, and in procuring license gave their true names. They have since lived together and been known under the family and legal name. The son desires to join the Navy and has made application for enlistment. It is necessary that he have a birth certificate but the record in the Bureau of Vital Statistics does not give his true name and he does not want to enlist under the name as disclosed by the record. Under Chapter 19063, Acts of 1939, may the State Registrar of Vital Statistics make and file a new certificate of birth?

To State Board of Health:

In my opinion Chapter 19063, Laws of Florida, Acts of 1939, is broad enough to authorize the State Registrar of Vital Statistics to make and file a new certificate of birth in this case and to enter upon an appropriate record of the Bureau the facts found by the Registrar, if the Registrar has received and filed proofs establishing to his satisfaction that the parents have intermarried subsequent to the birth. If the proofs received and filed fail to establish, to the satisfaction of the Registrar, that the parents have so intermarried, then the Registrar is authorized to make and file a new certificate only upon the submission to him of a certified copy of a judgment or decree issued by a court of competent jurisdiction either finally determining the parentage to be other than as registered, or providing for adoption, as set out in the Act.

BUREAU OF VITAL STATISTICS

August 7, 1942.—042-382.

CERTIFICATES—CERTIFIED COPIES

QUESTION: May certified copies of certificates issued by the Bureau of Vital Statistics be properly signed by the State Registrar and the Director of the Bureau of Vital Statistics by means of rubber stamp facsimiles of their respective signatures, provided the same are authenticated by an impression of the seal of the State Board of Health?

To Dr. Henry Hanson, State Health Officer, Jacksonville, Florida:

Yes. However, in the event a certified copy of any official record of the State Board of Health is desired for use as evidence in any legal proceeding and specific request is made that the certificate be signed in the handwriting of the Registrar and the Director, such request should be complied with.

BUREAU OF VITAL STATISTICS

March 25, 1942.—042-140.

INDEX—PRESERVATION

QUESTION: May the Florida State Board of Health destroy the useless temporary card index of births and deaths which is rendered unnecessary by the bound volumes which are permanent?

To State Board of Health:

Section 3288, Compiled General Laws of Florida, 1927 is in part as follows:

“The State Registrar shall further arrange, bind and permanently preserve the certificates in a systematic manner, and shall prepare and

PUBLIC HEALTH—Bureau of Vital Statistics

maintain a comprehensive and continuous card index of all births and deaths registered."

I thoroughly appreciate the situation caused by the necessity of having to use needed space for the storage of these old index cards which are no longer of any value.

However, the statute above quoted, directs the State Registrar to maintain these index cards, and it is my opinion that he must continue to preserve them until such time as the Legislature authorizes their destruction.

BUREAU OF VITAL STATISTICS

March 25, 1942.—042-139.

REGISTRAR—LIABILITY FOR FEES

QUESTION: The Bureau of Vital Statistics of the State Board of Health, collects fees for furnishing certified copies of birth and death certificates and from county judges for issuing marriage licenses. These moneys are first deposited in local banks, then at intervals transmitted to the State Treasurer. Should the messenger on the way to the bank be held up and robbed, who would be the loser?

To State Board of Health:

The Bureau of Vital Statistics of the State of Florida is under the immediate direction and supervision of the State Health Officer, who is, by virtue of his office, State Registrar of Vital Statistics (Section 3269, C.G.L. 1927). The State Registrar is charged with the execution of the Laws of Florida with reference to the registration of births and deaths, marriages and divorces in the Bureau of Vital Statistics.

The fees collected by the State Registrar for furnishing certified copies of birth and death certificates are provided for by Section 3291, C.G.L. 1927, which directs that:

"The State Registrar shall keep a true and correct account of all fees by him received under these provisions and turn the same over to the State Treasurer."

The fees received by the State Registrar from county judges for issuing marriage licenses are provided for by Section 3296, C.G.L. 1927, and these fees so collected are directed, under the provisions of Section 3301, C.G.L. 1927, to be transmitted each month to the State Treasurer.

It appears from these statutes above cited that the State Registrar is responsible for the payment of these fees so collected by him into the State Treasury.

The Supreme Court of Florida in the case of Thomas, et al. vs. Carlton, 143 So. 780, quoted with approval the following language:

"In 17 Ann. Cas. 929, the Annotator says:

"The great weight of authority sustains the following propositions with respect to the liability of a public officer and his sureties for the loss of public moneys: Where the statute in direct terms or from its general tenor imposes the duty to pay over public money received and held as such and no condition limiting that obligation is discoverable in the statute, the obligation thus imposed and assumed by the officer will be deemed to be absolute, and the fact that the money has been lost

PUBLIC HEALTH—Bureau of Vital Statistics

either through theft, robbery, bank failure, accidental fire, or other cause, without his fault, does not constitute a defense to an action for its recovery. The rule of the responsibility of a bailee for hire is not applicable to such a case. When the condition of the officer's bond is that he will faithfully discharge the duties of the office, and when the statute, as above stated, imposes the duty of payment or accountability for the money without condition, the obligors of the bond are subject to the same high degree of responsibility. The reasons upon which these propositions rest are to be found in the unqualified terms of the contract and in considerations of public policy.'"

The Supreme Court of Florida then stated:

"We hold with the majority rule as stated in 17 Ann. Cas. 929, hereinabove quoted."

Therefore the liability of the State Registrar for the fees collected by him for furnishing certified copies of birth and death certificates, and from county judges for issuing marriage licenses, is absolute.

VENEREAL DISEASE

August 6, 1942.—042-388.

**HEALTH OFFICERS—ARREST AND ISOLATION OF
INFECTED PERSONS**

QUESTION: A number of persons infected with venereal diseases have received one or two treatments from a local health unit and refused to report for subsequent treatment.

What offense can these persons be charged with so that they may be taken into custody and required to take further necessary treatment?

To Hon. Lloyd C. Powell, Prosecuting Attorney, Crestview, Florida:

Under the provisions of Section 384.07, Florida Statutes 1941, State, County, and Municipal Health Officers or their authorized deputies are authorized to isolate persons infected with a venereal disease. If it is known to the Health Officer from previous examination that a person is infected with a venereal disease, such person may under this section of the Statute, be isolated and required to submit to the proper treatment.

As an alternative, a local Health unit may require such person to submit to examination and inspection, and upon his failure to do so he may be prosecuted as for a misdemeanor under the provisions of Section 384.04, Florida Statutes 1941. Upon arrest and confinement of such person he may be isolated at the jail and required to submit to treatment.

VENEREAL DISEASE

March 10, 1942.—042-123.

SELECTEES—REFUSAL OF TREATMENT—ARREST

QUESTION: Negro selectees, rejected by the Army because of venereal disease, are refusing to submit to or continue treatment for cure of same in an effort to obtain a deferred classification and avoid military service. County Commissioners and County Judges question whether warrants can be issued for their arrest without advance payment of costs or security therefor. Is it within the province of the

PUBLIC HEALTH—Venereal Disease

Governor of the State of Florida to clarify the situation with the Board of County Commissioners and County Judges in reference to the issuance of warrants without bond.

To Hon. Spessard L. Holland, Governor:

It is generally recognized that officers charged with enforcement of the law are not required to make advance payment of costs or security therefor; and while Section 6176, R.G.S. (Sec. 8490, C.G.L.) provides:

"Prepayment may be required.—In all cases justices of the peace and county judges in this State shall require payment in advance or security for costs of process service of the same and of examination, unless the party applying for a warrant shall make an affidavit of insolvency and of substantial injury, to person or property, by him suffered, in which case process shall issue without payment of costs,"

the Florida Supreme Court has held that this statute "has no applicability to crimes of a public nature." *Osceola County vs. State, ex rel. Newton*, 115 Fla. 5, 155 So. 119; *Simmons vs. State*, 71 Fla. 340, 71 So. 278.

The phrase, "crimes of a public nature" was there used to distinguish between crimes when the complaining witness had suffered special damage to person or property and crimes in which the complaining witness has not suffered special damage.

Chapter 7829, Laws of Florida, Acts of 1919 (Secs. 3947-55 C.G.L.) relating to venereal diseases, after charging certain offenses which unquestionably are offenses of a public nature, by Section 7 thereof (Sec. 3931 C.G.L.) provides:

"State, County and Municipal Health Officers, or their authorized deputies within their respective jurisdictions, *are hereby directed and empowered*, when in their judgment it is necessary to protect the Public Health, to make examination of persons being, or suspected of being infected with a venereal disease, *to require persons infected with a venereal disease to report for treatment* to a reputable physician and continue treatment until cured, or to submit to treatment provided at Public Expense, *and to isolate persons infected with a venereal disease*. Provided, the suspected person shall not be apprehended, inspected or examined against his will, except upon the sworn testimony of the person or persons accusing; and upon the presentation of the warrant duly authorized by the Justice of the Peace or some court officer charged with the execution of this law."

By this statute Health Officers are specifically directed and empowered to require persons infected with venereal diseases to report for treatment. Having such statutory duty, the proviso therein contained that the suspected person shall not be apprehended except on a warrant based on sworn testimony, contemplates that Health Officers shall enforce the health laws without regard to said Section 8490, C.G.L. as other executive officers enforce penal statutes without regard thereto.

It is, therefore, my opinion that warrants charging violations of Chapter 7829, Laws of Florida, Acts of 1919 (Sections 3947-55 C.G.L.) should issue without requiring advance payment or security for costs; and it is within your province to so advise and clarify this situation with Boards of County Commissioners and County Judges.

While the same is not included in your above request, may I presume to offer the further opinion, that as the Chief Executive Officer of the State, it is your duty to advise General Vivian Collins, of the

PUBLIC HEALTH—Venereal Disease

Military Department of the State of Florida, of the condition reported by said State Attorney, with the request that he obtain from proper Federal Military Authorities complete lists of selectees rejected for military service on account of venereal diseases and solicit his cooperation with State Health Authorities in an effort to remedy the reported condition.

FLORIDA CRIPPLED CHILDREN'S COMMISSION

May 13, 1941.—041-254.

REFUNDING PLAN—POWER TO PARTICIPATE—PANAMA CITY BONDS

QUESTION: What are the powers of the Florida Crippled Children's Commission with reference to participating in the bankruptcy proceedings involving the City of Panama City and the question of the refunding of its bonds, some of which are owned by the above Commission?

To Dr. Terry Bird, Director of Services, Florida Crippled Children's Commission, Tallahassee, Florida:

I have examined Chapter 19430, Acts of 1939, which was the last Act with reference to the Florida Crippled Children's Commission. This Act provides:

"Said Commission shall have the power to contract or be contracted with, to sue and be sued, to plead and be impleaded in all Courts of law and equity, to receive donations and bequests. Said Commission shall have and possess all the powers of a body corporate . . ."

It is therefore apparent from this Act that you not only have the authority to receive donations and bequests, but that you possess all the powers of a body corporate with reference thereto, and can plead and be impleaded in Court. There is no limitation upon your authority. Therefore, if you think it to the best interest of the Commission that these bonds be accepted, I see no legal impediment thereto.

FLORIDA CRIPPLED CHILDREN'S COMMISSION

June 20, 1942.—042-308.

REFUNDING PLAN—POWER TO PARTICIPATE—PANAMA CITY BONDS

QUESTION: Is it proper for the Florida Crippled Children's Commission to participate in the proposed refunding plan of Panama City?

To Florida Crippled Children's Commission:

While a debt upon which interest has been allowed to accumulate in an amount almost equal to the principal would seem to be in order for refunding or other adjustment, I am of the view that you and all other holders of such bonds would be justified in requesting information as to the nature and value of the security for the payment of the refunding bonds. You can well appreciate the fact that while a bond issue may be legal, it may not be valuable. I do not know what security is back of the original bonds. Certainly the security for the new issue that you are requested to accept should not be less, but what that security is you are not advised by the proposal.

If you become satisfied that the proposed refunding issue is well secured, I see no objection to your participating therein.

PUBLIC HEALTH—Tuberculosis Sanatorium
TUBERCULOSIS SANATORIUM

February 12, 1942.—042-81.

APPLICANTS—ADMISSION—REQUIREMENTS

QUESTION: Is it a necessary prerequisite to admission as a patient in the State Tuberculosis Sanatorium for the applicant to have been a resident of Florida for a period of twelve months?

*To Dr. R. D. Thompson, Superintendent and Medical Director
State Tuberculosis Sanatorium:*

The State Tuberculosis Sanatorium was created by Chapter 12284, Laws of Florida, Acts of 1927.

Section 6 of this Act provided that patients should be admitted to the Sanatorium under such rules and regulations as the State Tuberculosis Board should adopt and promulgate from time to time. It was not required by the terms of this original Act that an applicant be a resident of Florida in order to be entitled to admission in the Sanatorium as a patient. However, this Act was supplemented by Chapter 18284, Laws of Florida, Acts of 1937.

Section 1 of this latter Act authorizes the State Tuberculosis Board to admit to the Sanatorium any tubercular person who has been a legal resident of the State of Florida and County from which such person may be sent, continuously for one year prior to applying for such admission, upon the terms and conditions set forth in the Act.

I believe this Section is controlling, and it is therefore my opinion that the Board is not authorized to admit as a patient at the State Tuberculosis Sanatorium any person who has not been a legal resident of the State of Florida continuously for one year prior to the date of his or her application for admission.

TUBERCULOSIS SANATORIUM

February 20, 1942.—042-91.

APPLICANTS—ADMISSION—REQUIREMENTS

QUESTION: Opinion dated February 12, 1942 (042-81) states that an applicant for admission to the State Tuberculosis Sanatorium must have been a legal resident of the State of Florida continuously for one year prior to application for admission. Under the facts below, would Mrs. Mary B. Brittain, who is now a patient in the Sanatorium, be considered a "legal resident"?

*To Dr. R. D. Thompson,*Superintendent and Medical Director,
State Tuberculosis Sanatorium:*

Mr. Brittain, the husband of Mrs. Mary B. Brittain, was a citizen and resident of Jacksonville, Florida, up until the time he went to China as a missionary and upon his return from China in 1940 he again took up his residence in the State of Florida at DeLand.

The term "legal resident" as used in Section 1 of Chapter 18284, Laws of Florida, Acts of 1937, authorizing the State Tuberculosis Board to admit to the Sanatorium as patients persons who have been legal residents of the State of Florida continuously for one year, is equivalent

PUBLIC HEALTH—Tuberculosis Sanatorium

to domicile or place of permanent abode, as distinguished from temporary residence.

Herron vs. Passailaique, 110 So. 539.

It is my opinion that if Mr. Brittain had his permanent place of abode and was domiciled in Florida, and went to China temporarily and with the intention of returning, and did in fact return and again take up his residence and place of abode in Florida, you would be authorized in finding that he has been a legal resident of Florida for the period required by the provisions of Section 1, Chapter 18284, supra.

As the wife's domicile follows that of her husband, you would also be authorized in finding that Mrs. Brittain has been a legal resident of Florida for the requisite period to entitle her to admission as a patient in the Sanatorium.

TUBERCULOSIS SANATORIUM

May 25, 1942.—042-259.

APPLICANTS—DUTY TO DETERMINE RESIDENCE

QUESTION: Has the State Tuberculosis Board authority to determine the residence of applicants for admission to the State Tuberculosis Hospital?

*To Mrs. May Pyncheon, Secretary, State Tuberculosis Board,
Jacksonville, Florida:*

Section 1 of Chapter 18284, Laws of Florida, Acts of 1937, authorizes the State Tuberculosis Board to admit to the State Tuberculosis Sanatorium any tubercular person who has been a legal resident of the State of Florida and the county from which such a person may be sent, continuously for one year prior to applying for admission.

Section 2 of the Act, authorizes the Board to admit to the Sanatorium any indigent tubercular legal resident of Florida who is sent to the Sanatorium by the Board of County Commissioners of the county in which such person is a legal resident, provided satisfactory financial arrangements shall have first been made with the Medical Director of the Sanatorium for the payment by such county of one-third and by the State of Florida of two-thirds of such person's per diem hospital charges.

Section 3 of the Act, authorizes the Board to admit to the Sanatorium upon such terms and conditions as it may deem proper, any tubercular legal resident of Florida who is financially able to pay his own hospital charges whether in full or in part. If such person is only able to pay less than one-third of his hospital charges he may be admitted only in the event the county from which such person is sent makes satisfactory arrangements with the Medical Director to pay the difference up to one-third of the charges, and the State has agreed to pay the balance.

Section 5 of the Act, authorizes the Board to prescribe such rules and regulations as it may deem necessary for the proper conduct and operation of the Sanatorium.

From a study of the entire Act, it appears that only tubercular persons who have been legal residents of the State of Florida for at least one year continuously prior to admission are eligible to be admitted to the Sanatorium.

PUBLIC HEALTH—Tuberculosis Sanatorium

The conduct and operation of the Sanatorium is placed in the hands of the State Tuberculosis Board, and it is my opinion that it is the duty of this Board to determine whether an applicant is entitled to admission to the Sanatorium before admitting such applicant. It is the Board's responsibility to determine in each case whether the applicant has been a legal resident of Florida for one year prior to admission, and it should reject the application if it finds that the applicant has not been such resident.

As this duty rests upon the Board and not upon the County Commissioners of the county from which such applicant is sent, I do not think that the county is liable for the per diem hospital charges of a patient over and above the amount it has agreed to pay in case the County Commissioners have erroneously certified a person to be a legal resident. It is the duty of the Director of the Sanatorium to see that financial arrangements are made which are satisfactory to him, for payment by the county of its part of the per diem charges before the patient is admitted to the hospital.

FARM COLONY FOR EPILEPTIC AND FEEBLE-MINDED

July 2, 1942.—042-330.

COMMITMENTS—JURISDICTION

QUESTION: Is it legal for the County Judge of Alachua County to commit patients to the Florida Farm Colony when such patients are residents of other counties?

*To Hon. J. Maxey Dell, Superintendent, Florida Farm Colony,
Gainesville, Florida:*

Section 3677, Compiled General Laws, provides that the County Judge, where a person afflicted with epilepsy, or who is of such feeble mind as to be irresponsible or requiring restraint, resides, shall have jurisdiction to commit such person to the Florida Farm Colony.

It is, therefore, my opinion that the only County Judge having jurisdiction to commit one to the Farm Colony is the County Judge in the county where the person afflicted resides.

FARM COLONY FOR EPILEPTIC AND FEEBLE-MINDED

August 19, 1942.—042-403.

COMMITMENTS—RESIDENCE REQUIREMENTS

QUESTION: William Lewis Anderson was discharged from Florida Farm Colony on May 20, 1942, but later came back to the colony of his own accord, stating that he could not get along with his brother after his father's death. If, by reason of the fact that Anderson has been at the colony now for several weeks, under this status could Alachua County be termed his residence for the purpose of having him committed to the Colony?

*To Dr. J. Maxey Dell, Superintendent, Florida Farm Colony,
Gainesville, Florida:*

One's residence depends upon his intention. If a person intends to make a certain place his permanent home, and pursuant to that intention proceeds there to establish his home, then such place becomes his residence. Therefore, the question of whether or not Alachua County

PUBLIC HEALTH—Farm Colony for Epileptic and Feeble-Minded

is William Lewis Anderson's residence, is a question of fact to be determined by his intentions and his actions. In determining his intentions, the question would naturally arise, in view of his prior commitment to your institution, as to whether or not he had the mental capacity to form such an intention. Therefore, from the facts before me, I am unable to say that Alachua County could be termed Anderson's residence for the purpose of commitment to your institution.

In discharging patients from the Colony, the statute makes it the duty of the board to satisfy itself that the child will be in good care, that he will be protected, and the community protected against him. Therefore, in the present case, if Anderson, in your opinion, continues to be in need of the asylum offered by your institution, then upon your recommendation and the full consideration of the facts involved, the Board of Commissioners of State Institutions could, in my opinion, if it determines that the purpose of Anderson's discharge has been thwarted by subsequent circumstances, revoke his discharge of May 20 and leave him at the Colony under his prior commitment.

FARM COLONY FOR EPILEPTIC AND FEEBLE-MINDED

April 30, 1942.—042-209.

INMATES—DISMISSAL

QUESTION: Has the Florida Farm Colony authority to refuse a child's parents permission to take such child on a visit away from the institution when the circumstances surrounding the case are such that they lead the institution to believe that the child will not be returned?

*To Dr. J. Maxey Dell, Superintendent, Florida Farm Colony,
Gainesville, Florida:*

The statutes provide a definite procedure for dismissal of patients from the Farm Colony, and likewise make the Board of Commissioners of State Institutions the legal guardian and custodian of all inmates of the Florida Farm Colony. It is the duty of the Board, through its agency, the Florida Farm Colony, and you as the superintendent thereof, to maintain the custodianship of the inmates of the Florida Farm Colony until such inmates have been released from the institution as provided by the statutes. Therefore, you not only have the authority, but it is your duty, to refuse a child's parents permission to take such a child on a visit away from the institution when the circumstances surrounding the case convince you that the child will not be returned to the institution, because if you, under those circumstances, do permit the child to be taken away from the institution, you would be neglecting your duty as custodian of the child, and the statutory provision with reference to the release of the inmates from the institution would be thereby evaded.

FARM COLONY FOR EPILEPTIC AND FEEBLE-MINDED

April 23, 1942.—042-200.

INMATES—ESCAPE—RETURN

QUESTION: Is it the responsibility of the Florida Farm Colony to see that patients who have escaped from the Farm Colony are returned to that Institution?

PUBLIC HEALTH—Farm Colony for Epileptic and Feeble-Minded

To Hon. J. Macey Dell, M.D., Superintendent, Florida Farm Colony:

The statute makes the Board of Commissioners of State Institutions the legal guardian and custodian of all persons admitted as patients to the Florida Farm Colony. This responsibility continues until such person is removed or dismissed from the institution as provided by law, even though the patient may escape from the Colony.

Therefore, it is the responsibility of the Board through the Farm Colony to see that inmates who have escaped are returned to the institution or are properly dismissed therefrom under the statute.

If, however, the escaped inmate is a pay patient, the expense incident to such return should be borne by the party paying for such patient's maintenance.

FLORIDA STATE HOSPITAL

September 4, 1942.—042-448.

COMMITMENT—STATUTORY REQUIREMENTS

QUESTION: Can the Florida State Hospital legally hold an insane prisoner committed by the County Judge of Union County, when the report of the examining committee upon which the commitment is based is signed only by two medical members thereof and is not signed by the lay member of said committee?

To Dr. J. H. Therrell, Superintendent, Florida State Hospital:

With reference to the examination and commitment of supposed insane persons, the statutes require the Judge of the Court to which the lunacy petition is submitted to appoint an examining committee consisting of one intelligent citizen and two practicing physicians.

The statutes further require said committee to make its report, which shall be signed by each of the three committee members. This report is the basis of the commitment, and the statutory provisions with reference thereto should be strictly followed.

Of course, your authority for holding the patient is the commitment itself, and if it should be void then you would have no legal authority to hold the person attempted to be committed.

A commitment based upon a report signed by only two members of the examining committee is, in my opinion, at least voidable, and you should refuse to accept such patient permanently, where you have knowledge of such an existing irregularity, and should insist upon a regular and proper proceeding for commitment before you accept such persons for permanent custody.

FLORIDA STATE HOSPITAL

December 15, 1941.—041-688.

INMATES—DECEASED—POWER TO EMBALM

QUESTION: Can the State Board of Funeral Directors and Embalmers prohibit the Florida State Hospital as a State agency from embalming and shipping the remains of patients who have died in the Hospital to their homes without paying a tax to said Board?

PUBLIC HEALTH—Florida State Hospital

To Dr. J. H. Therrell, Superintendent, Florida State Hospital:

The Act creating the State Board of Funeral Directors and Embalmers is a regulatory Act for the *profession* of funeral directing and embalming in this State, and Section 18 of the Act makes it unlawful for any person to engage in, practice, profess to practice, the *profession* of funeral directing or embalming, or to hold himself out to the public as a funeral director or embalmer, without having a license as provided for in the Act.

The Florida State Hospital is a humanitarian agency of the State of Florida for the care, maintenance and treatment of insane persons, who are considered as wards of the State, and to whom the State owes a peculiar duty with reference to their welfare and maintenance. The Hospital is not engaged in, does not practice, and does not profess to practice, the profession of funeral directing or embalming; neither does it hold out to the public that it is engaged in the funeral directing or embalming business. It causes to be embalmed only those patients dying at the Hospital. The duty of the State with reference to insane persons does not terminate at the instant of death. The State or its agency must still dispose of the body of the patient, either by surrendering it to persons entitled to receive it, or by interment in a suitable place provided for indigent patients having no survivors who will provide burial for such deceased patients. The health of the remaining patients demands that proper disposal be made of such dead bodies. If the State, through the Hospital as its agency, determines that this duty is best performed, and the health of the remaining patients and the public generally best protected, by embalming such bodies, it may regularly employ someone for that purpose, and, if it restricts such embalming service to patients who have died at the hospital, it does not become by reason of such activities subject to the provisions of the Funeral Directing and Embalming Act.

In my opinion, the State Board of Funeral Directors and Embalmers has no power or authority to require the State of Florida or its agency, the Florida State Hospital, to comply with the provisions of this Act, nor may it interfere with the State of Florida in shipping the remains of patients who have died at the Florida State Hospital.

FLORIDA STATE HOSPITAL

December 12, 1941.—041-696.

INSANE PERSONS—APPOINTMENT OF GUARDIANS

QUESTION: May a guardian of the property of an insane person be appointed by a court in the county where the patient is confined, or should the guardian be appointed by the court issuing the original commitment of such insane person?

To Dr. J. H. Therrell, Superintendent, Florida State Hospital:

Section 5913, Compiled General Laws of Florida, provides that county judges of this State shall have power to appoint guardians of persons adjudged insane or lunatic, domiciled in this State, whenever it appears necessary and proper. No specific jurisdictional requirements as to domicile, residence, situs of property, or location of person, other than the general requirement that the incompetent be domiciled within the State, is required by this statute. However, our general venue statute does provide that suit shall be begun only in the county where the de-

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fendant resides or where the cause of action accrued or where the property in litigation is.

Insane persons are considered as wards of the State, and the State is under a special duty to protect them and their property as a class incapable of protecting themselves. In many jurisdictions it is required that the insane person be a resident of the county wherein the appointment of a guardian is to be made. Others require that such insane persons be domiciled within the county wherein the appointment of a guardian is to be made. Still others require that the appointment of a guardian be made by a court in the county wherein property is owned by the incompetent. There are other jurisdictions which hold that the first appropriate court within the State to whom application is made for the appointment of a guardian may make such appointment to the exclusion of all other such courts.

There is, therefore, great diversity of opinion concerning the jurisdiction of courts to appoint guardians for property of insane persons. However, it is universally held that, where one guardian has already been properly appointed, no other court may appoint another such guardian. It is likewise generally accepted that, before a guardian may be appointed for an insane person, there must be of record an adjudication of insanity against such insane person.

An insane person's legal residence or domicile remains the same as it was at the time he became insane, because he thereafter is incapable of forming the necessary intent to change such residence or domicile.

If the property involved is real estate, in order to keep the record title to such property clear, it is necessary to record a transcript of the appointment of a guardian for such property in the county where the property is located. If such property is located in the county where the incompetent had his legal residence or domicile at the time of his commitment, and he was committed from that county, it would appear to be the better policy to have a guardian for the property of such person appointed by the county judge of that same county.

It is, however, my opinion that under our statutes the county judge of the county wherein the incompetent has legal residence or domicile, or where such incompetent owns property, or, for emergency purposes, where the incompetent is at the time of his or her becoming insane, may properly appoint a guardian for the property of such incompetent person.

FLORIDA STATE HOSPITAL

August 22, 1942.—042-412.

INSANE PERSONS—FINGERPRINTING AND PHOTOGRAPHING

QUESTION: Has the Florida State Hospital legal authority to fingerprint and photograph a patient not charged with crime?

To Dr. J. H. Therrell, Superintendent, Florida State Hospital:

The statutes provide that the superintendent of the Florida State Hospital shall cause the chief physician thereof to thoroughly investigate the history, and keep a complete clinical record, of each patient, which record shall be open for future reference by his successors, the superintendent, the cabinet authorities, legislative committees, and such others as may be legally entitled to same.

PUBLIC HEALTH—Florida State Hospital

If, on making a thorough investigation of the patient's history, it is necessary or advisable to fingerprint and photograph the patient in order to make such investigation of the patient, or the diagnosis required, then, in that event, it is my opinion that you have the authority to do so.

However, I am of the opinion that you do not have the legal authority to fingerprint and photograph any particular patient at the mere request of some investigative body unless such patient is lawfully charged with some specific criminal offense.

FLORIDA STATE HOSPITAL

February 10, 1941.—041-55.

INSANE PERSONS—MAINTENANCE

QUESTION: What method can the City of Miami employ to alleviate the burden now imposed upon it of maintaining certain insane persons lodged in the city jail?

To Hon. Lewis Twyman, City Attorney, Miami, Florida:

First, I find that:

(1) No person shall be committed to or received as a patient for treatment in the Florida State Hospital who has not been a bona fide resident of the State of Florida continuously for one year immediately preceding the examination of said person as provided by law. (See 3658 (11) 1940 Perm. Supp. C.G.L.).

(2) Apparently all moneys appropriated by the State for benefit of insane persons were appropriated to the Florida State Hospital.

(3) I am informed by the State Comptroller's office that no moneys are or have been paid by the State to the Miami Retreat.

(4) Miami Retreat appears to be a privately owned and operated hospital for alcoholics and insane and is not a substation for the Florida State Hospital.

Second, with reference to some solution to the problem confronting the Police Department of the City of Miami, there are two or three probabilities:

(1) The general statutes with reference to cities and towns provide that the city or town council shall have the power to provide for the support of the poor and infirm and the insane and to establish public schools and to provide for their maintenance.

The general laws of the State applying to cities and towns were made a part of the city charter of the City of Miami as amended and re-enacted in 1925, and under this statute the City Commission of the City of Miami would undoubtedly have the authority to make provisions for the custody, care and maintenance of insane persons.

(2) The statutes provide that when it is supposed that a person, resident of the State, is insane, a petition signed by five reputable citizens, not more than one of whom shall be a relative of the person, setting forth that he or she is to each of the petitioners personally known, and that their knowledge of the mental condition of the subject is sufficient to justify the belief that he or she is insane and asking that examination be instituted and made as provided by law, may be presented to the

PUBLIC HEALTH—Florida State Hospital

County Judge or Judge of the Circuit Court having jurisdiction. (Sec. 3654, C.G.L.).

It then becomes the duty of the County Judge to have the supposed insane person examined by an examining committee, composed of one good and lawful citizen and two practicing physicians of good professional standing regularly appointed by the Court (Sec. 3658 (3) 1940 Perm. Supp. C.G.L.) and on receiving the report of the examining committee the Judge shall examine the same and if satisfied therefrom that the person examined and reported is insane, he, the said Judge, shall so adjudge and decree and shall make an order that the Sheriff of the County from which the report is submitted shall at once deliver the person so adjudged to the Superintendent of the Florida State Hospital, there to be received for care, maintenance and treatment, as provided by law. (Sec. 3657, C.G.L.).

However, when the proceedings reported by the examining committee show the alleged insanity is chronic or produced by epilepsy or senility and that the person does not require confinement or mechanical restraint to prevent self-injury or violence to others, but that he or she is indigent, the Judge shall adjudge and decree that the person is incurably insane, harmless and indigent and shall make and issue his order that the Sheriff shall deliver the person so adjudged to the County Commissioners of the County where he or she resides, for care and maintenance as by law made and provided for paupers. (Sec. 3657 C.G.L.).

Of course, if the insane person has not been a resident of the State of Florida for at least one year he cannot be accepted or received in the Florida State Hospital. However, the foregoing section with reference to the commitment of insane persons by the County Judge or Judge of the Circuit Court having jurisdiction, does not prescribe any definite period of residence but merely limits the provisions of the Act to residents of this State.

A resident of Florida is one who has lived in this State all of his natural life, or one who has come to this State with the bona fide intention of making this his or her legal residence. It matters not whether he or she has been here one day, one month, one year or any number of years.

With reference to the question of whose duty it is to provide care and maintenance and protection for insane people, I find the following utterances from various courts:

"The custody of idiots and lunatics from a very early period became vested in the Crown."

Yoemans vs. Williams, 117 Ga. 800, 45 S.E. 73.

"So after the revolution the power became vested in the State or the people thereof."

Bliss vs. Bliss, 133 Md. 61, 104 A. 467.

"Insane persons are considered as wards of the State."

Board of Chosen Freeholders of Camden County vs. Ritson 68 N.J. Law 666, 54 A. 839.

"The jurisdiction rests upon two grounds: Duty to protect the community from the acts of those who are not under the guidance of reason

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and secondly, the State's duty to protect them as a class incapable of protecting themselves, which has its foundation in the reciprocal obligations of allegiance and protection."

Matter of Colah, 3 Daly (N.Y.) 539, 32 C.J. 627.

The foregoing quotations and citations are taken from *State versus Fabisinski*, 152 So. 207, where they form an affirmative part of the opinion rendered in that case by the Supreme Court of Florida.

Likewise, in the case of *ex parte Hansen*, 162 So. 715, the Supreme Court of Florida said:

"Insane persons are wards of the State and the State is under a special duty to protect them and their property as a class incapable of protecting themselves."

It, of course, cannot be argued that a municipality is a part of the State government and as such has a similar duty or should act in place of the State with reference to insane persons because in this State municipalities, while creatures of the Legislature, nevertheless form no part of the State government as such considered in its broad and comprehensive sense. (See *Attorney General vs. Connors*, 9 So. 7.)

In my opinion the paramount duty as between the city and the State for the care, maintenance and protection of insane persons and of the public from such insane persons rests primarily upon and with the State.

It would appear that the most practicable solution for the problem would be for the Chief of Police of the City of Miami to institute lunacy proceedings for such insane prisoners as may be in the city jail in the County Judge's Court of Dade County and allow the County Judge to solve the problem after passing on their sanity. If he decides that such prisoners are in fact sane, they can be discharged. If, on the other hand, he adjudges them to be insane, it then becomes the duty of the Judge to render an order providing for their care and maintenance, whether to the State Hospital or by the County Commissioners of Dade County.

FLORIDA STATE HOSPITAL

November 21, 1941.—041-660.

INSANE PERSONS—TRANSPORTATION

QUESTION: On more than one occasion the Florida State Hospital has sent its agent with its bus to the home of some patient for the purpose of transporting such patient to the Hospital, and either the patient has refused to go or the patient's relatives have refused to deliver the patient to the attendant, thus entailing unreasonable transportation expense on the Hospital.

May the Hospital limit the place of acceptance of patients to the County seat of the County from which they have been committed, and require that patients be delivered to it only by the sheriff or some other official of the county?

To Dr. J. H. Therrell, Superintendent, Florida State Hospital:

The statute provides that if it shall appear that any lunatic or insane person is destitute, then the committing judge shall deliver such lunatic or insane person to the sheriff for safekeeping, who shall notify the

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superintendent of the hospital for the insane, and said superintendent shall send a nurse or some suitable attendant for such lunatic or insane person, and the sheriff shall deliver the patient to such nurse or attendant, who shall transport such person to the hospital for the insane and deliver him or her to the proper officers for care, custody and treatment. The statute further provides that the actual expenses of such nurse or attendant, together with the expenses of transportation of such patient, shall be paid from the money appropriated for the maintenance of said hospital for the insane.

The statute above referred to contemplates that the committing judge shall deliver the insane person to the sheriff of the county wherein the commitment is issued, and that the superintendent of the hospital shall send suitable attendant to that county for the purpose of receiving the patient for transportation to the hospital for the insane.

As superintendent of the Florida State Hospital, it is your duty to husband the money appropriated for the maintenance of said Hospital from which expenses for transportation of patients are paid, and in doing this you may properly require that all patients to be transported by you to the Hospital shall be delivered by the sheriff to your representative at the county seat of the county from which such person has been committed, and thus refuse to pick up patients wherever else they may be found.

FLORIDA STATE HOSPITAL

August 18, 1942.—042-400.

INSANE PERSONS—TRANSPORTATION

QUESTION: Is the Florida State Hospital required to send its bus to various points in the State to receive and transport to the State Hospital persons charged with some criminal offense and committed to its institution by the trial judge pursuant to the Criminal Code?

To Dr. J. H. Therrell, Superintendent, Florida State Hospital:

Among other things, Section 30.23, Florida Statutes 1941, which prescribes the fees to be allowed to sheriffs, provides that the sheriff shall be entitled to charge \$6.00 per day for himself and \$5.00 per day for each guard actually necessary in conveying prisoners to the State Hospital, and that the State will furnish transportation.

The State has no appropriation for such transportation of insane persons charged with crime, unless it is found in the appropriation to the Florida State Hospital.

In the report of the Budget Commission for the biennium 1941-1942 for the Florida State Hospital, there appears the following in the breakdown of the "necessary and regular" requests:

"Traveling and transportation of patients and prisoners\$3,500.00."

The prisoners referred to in the foregoing quotation from the Budget Commission report are those transported from Raiford to the prison camps located at your institution, and from such prison camps to Raiford. It does not refer to prisoners charged with crime but committed to your institution because of insanity.

Insane persons charged with crime and committed to your institution are not, however, in the true sense of the word, prisoners, but

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are wards of the State for their own as well as society's protection. It is true that such persons may not be discharged from the Hospital without the consent of the committing court but must be held for such court in the event sanity is restored. Nevertheless, upon commitment to your institution they become patients of the Hospital and should be transported there just as other patients are who are committed to your care. Of course, the sheriff is required to furnish such guards as may be necessary under the circumstances, the expense of which is not chargeable to the Florida State Hospital transportation fund, but to the counties from which such persons are committed.

It is, therefore, my opinion that you should send your bus to pick up such patients as you have described, in the same manner as you do other patients committed to your institution.

FLORIDA STATE HOSPITAL

August 21, 1942.—042-411.

MAINTENANCE—RECOVERY OF COSTS OF INSANE INDIGENTS

QUESTION: Has the Board of Commissioners of State Institutions the right to recover the costs of maintenance of those insane persons committed to the Florida State Hospital as indigents when such persons were not in fact indigent at the time of commitment or who have subsequently acquired an estate, taking into consideration not only present inmates of the hospital, but likewise patients who have been discharged or who have died?

To Board of Commissioners of State Institutions:

The statutes authorizing the commitment of insane persons to the Florida State Hospital contemplate the indigent insane and those who are able to pay for their own maintenance and support. Nowhere, however, do the statutes purport to permit the maintenance at public expense of insane persons who have sufficient estate with which to pay for their own support.

At common law, the estate of an insane person is liable for necessities furnished him. Neither express contract nor statute is necessary to create this liability. Recovery may be had, therefore, on an implied contract or quantum meruit. The mere fact that the insane person has been discharged from the hospital or has died would not affect the right to recover the cost of maintenance or support of such insane person.

Even though the committing court may have found at the time of the commitment that the insane person was indigent, such a finding merely fixes his status at that time and any after acquired property may be applied to his maintenance and support from the date of the acquisition of such property. Of course, if the determination of indigency at the time of commitment was brought about by fraud, such a finding would not prejudice the right to recover for past maintenance and support.

It is my opinion that the statute of limitations does not run against the State in matters of this kind, and recovery may be had at any time an appropriate estate is found against which to proceed.

CHAPTER XXII

SOCIAL WELFARE

STATE BOARD OF PUBLIC WELFARE

February 6, 1942.—042-64.

COUNCIL FOR THE BLIND—EMPLOYEES—GROUP HOSPITALIZATION AND HEALTH INSURANCE

QUESTION: (1) Are employees of the Florida Council for the Blind eligible to make application for group hospitalization and health insurance?

(2) Have such employees any avenue open to them whereby, under existing law, they may by act of the Council come under any kind of retirement plan?

*To Florida Council for the Blind, Wallace S. Building,
Tampa, Florida:*

(1) A study of Chapter 20714, Acts of 1941, by which the Florida Council for the Blind was created, leads me to the conclusion that such Council is a governmental bureau of the State of Florida and its employees are State employees.

Thus, under Chapter 20852, Acts of 1941, the Florida Council for the Blind, as a governmental bureau of the State of Florida, is authorized, empowered and permitted, to provide for life, health, accident, hospitalization, or annuity insurance, or all of any kinds of such insurance, for its employees, upon a group insurance plan, and to that end to enter into agreements with insurance companies to provide such insurance.

(2) The only retirement plan for State employees generally existing under the present law that I have been able to ascertain, is that provided for in Chapter 20499, Acts of 1941. This Act requires that State officials or employees must have served the State either as an official or as an employee, or both, for as much as an aggregate time of thirty years or more and have attained the age of seventy years, or have served the State for as much as thirty-five years, irrespective of attained age. The retirement benefits under such circumstances are payable monthly during the remainder of such person's natural life, and amount to one-half the amount of the average monthly salary received by such person during the last ten years of such service.

STATE BOARD OF PUBLIC WELFARE

February 6, 1942.—042-66.

COUNCIL FOR THE BLIND—MEMBERS—LIABILITY FOR TORTS

QUESTION: Is the Florida Council for the Blind liable for torts of the individual members of the Council or employees of the Council?

To Florida Council for the Blind:

In another opinion rendered to your Council, I stated that in my opinion your Council was a governmental bureau or agency of the State

SOCIAL WELFARE—State Board of Public Welfare

of Florida. In view of this holding, it is my opinion that the Florida Council for the Blind would not be liable for the torts of its individual members, nor would it be liable for the torts of its employees, on the theory that, being a State agency, a suit of such kind against the Council would in effect be a suit against the State, and the State is immune from such suits unless its consent to be sued has been specifically given.

However, I call your attention to the fact that as a State board or agency you are probably under the Workmen's Compensation Act, and if one of your employees is injured by another of your employees, then in that event there would probably be a liability for compensation to the injured employee under the Workmen's Compensation Act. However, this opinion does not purport to pass upon such probable liability. I merely call it to your attention for such investigation of this question as you care to make.

STATE BOARD OF PUBLIC WELFARE

March 21, 1942.—042-135.

DISTRICT BOARDS—VACANCIES—APPOINTMENTS

QUESTION: What is the duty of the Governor in the appointment of members of district boards of social welfare in the case of vacancies, particularly as to whether or not commissions to fill vacancies on such boards shall be made for a full four-year term beginning with the date of the appointment or for the unexpired term dating from the beginning of the term in which the vacancy occurs?

To Hon. Spessard L. Holland, Governor:

Chapter 19375, Acts of 1939, provides that members of district boards shall be appointed by the Governor and shall serve at the pleasure of the Governor for a period not to exceed four years. There is no provision in this Act relating to the filling of vacancies on such boards. However, I believe your question has been answered by the Supreme Court in the case of *State ex rel Landis vs. Bird*, 120 Fla. 780, 163 So. 248, in which case the Supreme Court gave a very exhaustive treatment on the subject of appointments by the Governor. In this case, the Court said:

"Where an office with stated terms is to be filled by executive appointment without confirmation by the Senate, the Governor appoints for the term and may appoint to fill a vacancy until the end of the term, and may appoint a successor at any time after the expiration of a term for the whole or for the remainder of the new term if a part of such term has passed when the appointment is made. Sections 7, 16 Art. IV; sections 461 (396) to 464 (399), 1790 (1232) Comp. Gen. Laws; *State ex rel vs. Amos*, 101 Fla. 114, 133 So. 623. The Governor cannot appoint an officer for a period different from that stated in the law. Opinion of Justices, 14 Fla. 277."

Therefore, the appointment to fill the vacancy occurring on the district board should be for the unexpired term dating from the beginning of the term in which the vacancy occurs.

It is also my opinion that the commission should state that the appointee shall serve at the pleasure of the Governor, but not to exceed four years from the beginning of the term in which the vacancy occurs.

SOCIAL WELFARE—State Board of Public Welfare
STATE BOARD OF PUBLIC WELFARE

October 16, 1942.—042-491.

STATE AGENCY—GOVERNMENTAL FUNCTIONS

QUESTION: Is the State Welfare Board a State Agency?

To State Welfare Board, Jacksonville, Florida:

Article XIII, Section 3, of the Constitution provides in part as follows:

"The respective counties of the State shall provide in the manner prescribed by law, for those of the inhabitants who by reason of age, infirmity or misfortune, may have claims upon the aid and sympathy of society; provided, however, the Legislature may by general law provide for a uniform Statewide system for such benefits, and appropriate money therefor . . ."

The foregoing constitutional provision was adopted at the general election of 1936, and Section 4 of the same article provides that the first Legislature that convenes after the adoption of said article shall enact the necessary laws to carry the same into effect.

Accordingly, the Legislature of 1937 enacted Chapter 18285, Laws of Florida, Acts of 1937, which now is found in Chapter 409, Florida Statutes 1941.

Thus by the Constitution the care of those who by reason of age, infirmity or misfortune may have claims upon society, is made a governmental function, and the Legislature, pursuant to constitutional provision, has set up the State Welfare Board and delegated to it the sovereign power and authority with reference to said governmental function.

The grant of power to the State Welfare Board, and the duties imposed upon it by statute, are very broad and comprehensive. This Board or agency is specifically charged with the duty of conducting, supervising and administering, or causing to be administered, within the State of Florida, all social welfare and relief work which is or will be carried on by the use of Federal or State funds. It is specifically authorized and empowered to act as the agent of the Federal government, State government, or any county or municipal government, in the conduct and administration of public aid and social welfare activities. It is authorized to employ such staff and employees and prescribe such rules and regulations as may be necessary in carrying out its functions and duties.

Therefore, it is my opinion that the State Welfare Board, the members of which are appointed by the Governor and confirmed by the Senate, is a State agency, charged with and exercising important governmental functions for the welfare of the State and society in general.

POOR MOTHERS AND DEPENDENT CHILDREN

November 27, 1942.—042-537.

**COUNTY COMMISSIONERS—MAINTENANCE OF
EMERGENCY FUND**

QUESTION: May the boards of county commissioners, under chapter 414, Florida Statutes, 1941, maintain, or advance the money to and permit the State Welfare Board or one of its agencies to maintain, an

SOCIAL WELFARE—Poor Mothers and Dependent Children

emergency fund out of which moneys may be immediately expended for the relief of dependent children when the exigencies of the case require it?

*To State Welfare Board, P. O. Box 989, Jacksonville, Florida,
Attention Mr. William J. DeHoff:*

It appears that dependent children are often picked up in the more thickly populated communities without sufficient clothing and food and in such physical condition as to require immediate financial aid. Often the board is handed the custody of a dependent child, by some juvenile or other court or agency, on very short or even without notice, which has been abandoned and is without proper clothing and food and in need of immediate medical care. Under these conditions the board does not have time to procure the approval of a warrant for the aid of the child by the county commissioners and to cash such warrant. The best interests of the child, and maybe its health or life, demand immediate financial aid.

The provisions of chapter 414, Florida Statutes, 1941, which provide for the relief of poor mothers and dependent children, do not seem to contemplate that the act should be used for general welfare purposes but contemplate allowances payable by the month (section 414.02, Florida Statutes, 1941). The statute was intended to aid and assist in the general expenses and upkeep of the poor mothers and dependent children and not for the purposes of immediate aid and welfare. The act contemplates that an investigation be made of each case before payments are approved or allowed (sections 414.06 to 414.09, Florida Statutes, 1941); this requirement cannot be carried out if immediate payment is to be made.

It, therefore, appears that the question above stated must be answered in the negative. This opinion is based upon the provisions of chapters 409 and 414, Florida Statutes, 1941, when read and construed together, and does not extend to any right the county might have to set up such a fund from other accounts of the county under the general power given the county commissioners "to have care and provide for the poor and indigent people of the county" (section 125.01, sub-section (4), Florida Statutes, 1941).

POOR MOTHERS AND DEPENDENT CHILDREN

October 6, 1942.—042-478.

COUNTY FUNDS—ADMINISTRATION FOR PUBLIC AID

QUESTION: (1) Have the county commissioners of the several counties of this State power and authority to delegate to the State Welfare Board and its agencies the duty of making investigations for the purpose of ascertaining the poor mothers with dependent children and the dependent children who should be aided or who are entitled to relief under the provisions of chapter 414, Florida Statutes, 1941?

(2) Have the county commissioners of the several counties of this State power and authority to transfer county funds, levied and collected for the relief of poor mothers with dependent children and dependent children, under chapter 414, Florida Statutes, 1941, to the State Welfare Board to be expended by that board?

(3) Where either the State Welfare Board, a district welfare board or some corporation not for profit is named as custodian of a dependent

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child, under section 415.17 or section 415.28, Florida Statutes, 1941, is such dependent child within the operation of section 414.03, Florida Statutes, 1941, which permits dependent children to receive benefits under said chapter if living with a "guardian approved by proper authorities"?

(4) Where the county commissioners, upon proper petition, grant a special privilege of separation as authorized by section 414.10, Florida Statutes 1941, to a dependent child, is such dependent child within the operation of said chapter 414 and entitled to receive benefits thereunder?

To Hon. Bryan Willis, State Auditor:

Chapters 409 and 414, Florida Statutes, 1941, appear to relate to the same general subject matter and are in pari materia and should be construed together; the provisions of both have been continued in force by the adoption of the Florida Statutes, 1941. Under section 409.02, Florida Statutes, 1941, the State Welfare Board may act as agent for any county in the administration of public aid to poor mothers with dependent children and to dependent children.

Under chapter 414, Florida Statutes, 1941, the county commissioners, in administering a fund raised under said chapter for the relief of poor mothers with dependent children and dependent children, are authorized to cause investigations to be made "by and through such agency as the board of county commissioners shall deem advisable." This agency may be the State Welfare Board or any of its district boards.

Chapter 414, Florida Statutes, 1941, does not authorize the county commissioners to turn the fund over to the State Welfare Board to be expended at the discretion of that board. The extent of the powers of the county commissioners that may be delegated are only those connected with the investigation necessary for the determination of the person entitled and qualified to receive aid from the fund.

When chapters 409 and 414 are construed together, it seems that:

(1) The county commissioners of the several counties of the state have power and authority to delegate to the State Welfare Board and its agencies the duty of making investigations for the purpose of ascertaining the poor mothers with dependent children and the dependent children who should be aided or who are entitled to the relief under the provisions of chapter 414, Florida Statutes, 1941. When the State Welfare Board or any of its agencies has investigated and ascertained the persons entitled to aid they should report their findings to the county commissioners who should either approve or reject that report. If approved they should cause payment to be made by the county in the usual manner.

(2) The county commissioners do not have power and authority to transfer county funds, levied and collected for the relief of poor mothers with dependent children and dependent children, under chapter 414, Florida Statutes, 1941, to the State Welfare Board to be expended by that board.

(3) Where either the State Welfare Board, district welfare board or some corporation not for profit, is named as custodian of a dependent child under section 415.17 or section 415.28, Florida Statutes, 1941, such dependent child is within the operation of section 414.03, Florida Statutes, 1941, which permits dependent children to receive benefits under said chapter if living with a "guardian approved by proper authorities." In

SOCIAL WELFARE—Poor Mothers and Dependent Children

this case I am of the opinion that the county commissioners should also grant a separation under section 414.10, Florida Statutes, 1941, in order to properly qualify such child to relief. In my opinion, the use of the word "guardian" in said section 414.03 was intended in its broad and not in its strict definition and was intended to embrace any person given custody of a child by legal authority.

(4) Where the county commissioners, upon proper petition, grant a special privilege of separation as permitted by section 414.10, Florida Statutes, 1941, to a dependent child such dependent child is within the operation of said chapter 414 and entitled to receive benefits thereunder, if otherwise qualified, such benefits to be paid to the guardian or other person having custody of the child.

DEPENDENT AND DELINQUENT CHILDREN

March 4, 1942.—042-113.

COUNTY JUDGES—JURISDICTION AS JUVENILE JUDGES

QUESTION: (1) What is the jurisdiction of a county judge sitting as a juvenile judge, over delinquent children, which jurisdiction is governed by Sections 3684-3715, Compiled General Laws, 1927?

(2) In what county should a person aiding in an escape of an inmate of the industrial school for girls be tried?

*To Hon. Harvey E. Page, County Judge, Escambia County,
Pensacola, Florida:*

(1) Section 3684, C.G.L. 1927, in defining a "delinquent child" states that the term shall include "any child less than seventeen years of age" who falls within any of the several classes enumerated in the section. In applying this statute, the Supreme Court has held that a person less than seventeen years of age cannot be sentenced by the trial judge for the offense, but must be given into the custody of the juvenile judge for treatment in accordance with the statutes relating to delinquent children. *State ex rel Stiegel vs. Chapman*, 119 Fla. 347, 161 So. 424. In the case of *Ex parte Kitt*, 109 Fla. 202, 147 So. 574, the Supreme Court held that the adjudication of guilt of a person under seventeen years of age "must be made in the appropriate court vested by law with the power to adjudge guilt, as distinguished from the power to adjudge the fact of delinquency . . . after which sentence on the adjudication of guilt may be imposed, or the child may be remanded to the juvenile authorities for proceedings looking to his commitment as a 'delinquent child.'"

Upon the basis of these two cases, therefore, it appears that the trial of a person under the age of seventeen years, accused of a crime, may be tried on the issue of guilt or innocence in any court having jurisdiction of the offense. However, the power to adjudicate such person to be a "delinquent child" and to prescribe treatment for him is vested in the juvenile court.

Some confusion is caused, perhaps, by the provision of Section 3705 C.G.L. 1927, which permits any court in the case of a child less than sixteen years of age who has been arrested and brought before the court for trial to take charge of the child in the same manner provided for the taking charge of delinquent children by the county judge. Although the statute might be interpreted to give such court the power of sentence in the case of guilt, it was not so construed by the Supreme

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Court in the case of *State ex rel. Stiegel vs. Chapman, supra*. In discussing this statute, the Supreme Court, in the case of *State ex rel. Hamilton vs. Chapman*, 125 Fla. 235, 169 So. 658, considered this section as providing punishment for children less than sixteen years of age, with the exception of children accused of committing the crimes enumerated in Section 3706 C.G.L. 1927. The Court stated that persons between the ages of sixteen and eighteen years, and any child under sixteen who had committed any of the crimes named in Section 3706 C.G.L. 1927, should be sentenced in accordance with the requirements of Section 8644 C.G.L. 1927.

The above decisions and statutes indicate that a distinction must be made between "delinquent" children and children "convicted of a crime." Only the juvenile judge has the power to adjudicate a child under seventeen years of age to be a delinquent child and to prescribe treatment for him in accordance with Sections 3684 and 3686 C.G.L. 1927.

If the child is accused of committing a crime, however, his trial on the issue of guilt or innocence may be in any court having jurisdiction of the offense. According to the case of *State ex rel. Stiegel vs. Chapman, supra*, however, his sentence should be prescribed by the juvenile judge; but there are two exceptions to this rule as stated in the case of *State ex rel. Hamilton vs. Chapman, supra*: (1) Children guilty of committing any of the crimes enumerated in Section 3706 C.G.L. 1927, may be sentenced by the trial court; (2) Children between the ages of sixteen and eighteen may be sentenced by the trial court under Section 8644 C.G.L. 1927.

Although the decided cases and statutes pertaining to this question are not free of confusion, the above is a fair summary of the law at this time.

(2) As you state, Section 3704 C.G.L. 1927, provides that when a county judge commits a child to such an institution, the child remains subject to the control of the judge. Accordingly, if a person aiding in the escape of such a child is being tried for contempt of the Court's order, the trial should be before the Court which issued the order.

If, however, the person aiding in the escape is charged under Section 7539 C.G.L. 1927, the trial should be held in the county in which the defendant aided in such escape, inasmuch as the act made punishable by Section 7539 would, in such case, have taken place in that county.

DEPENDENT AND DELINQUENT CHILDREN

April 23, 1941.—041-226.

JUVENILE COURT—JUDGE—COMPENSATION

QUESTION: What laws govern the salary of the Judge of the Juvenile Court of Hillsborough County at the present time?

*To Hon. Paul Kickliter, Judge of the Juvenile Court,
Tampa, Florida:*

As you stated in your letter, Section 3715, Compiled General Laws of 1927, being Chapter 7877, Laws of Florida, Acts of 1919, applies to counties having a population of 90,000 or more, and provides that the salary of Judges of Juvenile Courts in such counties shall be \$1,200 a year.

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The Legislature in 1929 enacted Chapter 13672, which fixes the compensation of the Judge of the Juvenile Court of Hillsborough County at the amount of \$3,000 a year. In 1935 the Legislature enacted Chapter 17083, which fixes the salary of Judges of Juvenile Courts at \$4,800 a year in counties having a population of more than 180,000, according to the last preceding State Census, but this cannot be applicable to Hillsborough County, because the population according to the 1935 State Census was 159,208.

In 1939 the Legislature enacted Chapter 19352, which fixed the salaries of such Judges at \$3,600 a year in counties having a population of not less than 100,000 and not more than 170,000, according to the last preceding State or Federal Census, which Act was previously applicable to Hillsborough County, but is not now applicable because of the greater population announced in the 1940 Federal Census. This Chapter repealed all laws and parts of laws in conflict with its provisions.

At the same session, the Legislature enacted Chapter 19597, providing for courts to be known as juvenile and domestic relations courts, but this Act was made expressly applicable only to counties having a population of over 180,000, according to the preceding State or Federal census, but applies only to juvenile courts "presided over by a Judge required to be admitted to practice law in this State . . ."

I know of no requirement that the Juvenile Court Judge of Hillsborough County be admitted to practice law in this State.

Assuming the above statutes to have been valid, the following seems to be the present legal situation so far as the compensation of the Juvenile Court in your county is concerned.

Chapter 7877 was made inapplicable to Hillsborough County, when Chapter 13672 was passed in 1929, and Chapter 13672 was impliedly repealed when Chapter 19352 was enacted by the 1939 Legislature, applicable to counties with a population of 100,000 to 170,000. The legislative intent to repeal Chapter 13672 by implication seems to have been clear. When Hillsborough County was lifted from that population bracket by the 1940 Federal Census and shown to have a population of more than 180,000, Chapter 7877 seems again to be rendered applicable to Hillsborough County. It must be admitted, however, that the legal situation here involved is rather intricate, and there is no definite way to determine how the Courts would rule on these questions of implied repeals in this series of statutes.

DEPENDENT AND DELINQUENT CHILDREN

October 21, 1941.—041-594.

JUVENILE COURT JUDGE—TERM OF OFFICE

QUESTION: Under Chapter 11972, Acts of 1927 does there now exist a vacancy in the office of Judge of the Juvenile Court of Pinellas County which may be filled by appointment for the unexpired portion of the current term?

To Hon. Spessard L. Holland, Governor:

Chapter 11972, Acts of 1927, establishing a Juvenile Court for Pinellas County, provided for the appointment by the Governor of a Judge of said Court, whose term of office should be for two years from the date of his appointment and until his successor is appointed and qualified.

SOCIAL WELFARE—Dependent and Delinquent Children

"Unless otherwise duly provided, where an office is created the term begins when the office is first filled."

State vs. Amos, 133 So. 623.

"The provisions of section 14, article 16 (Constitution) that an officer shall continue in office after the expiration of his official term until a successor is qualified, is intended to prevent a hiatus and does not affect the cycle of the term fixed by law which ends at the expiration of the statutory term periodically whether the incumbent or another is the successor."

Idem.

"Where, after expiration of four-year term, incumbent held over and eight months later was appointed for four-year terms from latter date, office, nevertheless, became vacant, for purpose of executive appointment, when statutory term from previous expiration had run; law and not commission issued to officer controls as to term of office."

Idem.

There are other cases, all to the same effect.

While the office in question is a judicial one, it is purely statutory, appointments thereto do not require confirmation of the Senate, and there are no such questions involved as were developed in the case of State, ex rel. Bird, 163 So. 248.

* On authority of the above cited cases, therefore, and that of the Advisory Opinion to yourself of May 21, 1941, 2 So. 2d 372, I am of the opinion that there now exists such a vacancy in the office of Judge of the Juvenile Court of Pinellas County as may be filled by appointment for the unexpired portion of the current term, which began according to the turn of cycles beginning with the first appointment to said office, the commission issued to the present incumbent in June 1939, according to his letter to you of the 13th instant, for a four-year term being unauthorized, because the statute creating the office limited the term to two years and until a successor is appointed and qualified.

DEPENDENT AND DELINQUENT CHILDREN

January 27, 1942.—042-45.

PROBATION OFFICER—TERM

QUESTION: What is the length of term of a Probation Officer?

To Hon. Spessard L. Holland, Governor:

Chapter 11972, Acts of 1927, creating the Juvenile Court in Pinellas County, provides for the appointment by the Governor, upon recommendation of the "County Commissioners" of a Probation Officer. The term is fixed at two years "from the date of appointment," but the Act also provides that the term of the then Probation Officer should not be shortened.

Therefore, the first term of office under the 1927 Act began when the successor to the then Probation Officer expired, and expired two years later, and the terms continue to run in cycles of two years from this first appointment, the date of which is not shown by the data before me.

A four year appointment was clearly unauthorized and did not extend the term, although perhaps good for the lawful period.

SOCIAL WELFARE—Dependent and Delinquent Children**DEPENDENT AND DELINQUENT CHILDREN**

August 18, 1942.—042-402.

PROBATION OFFICER—TERM

QUESTION: When does the present term of the Probation Officer of Pinellas County end?

To Hon. Spessard L. Holland, Governor:

Although the language of Section 14 of Chapter 11972, Acts of 1927, varies from that usually employed in fixing terms of office, I construe it as fixing a two year term beginning with the date of the first appointment which, as you state the records of the Secretary of State show to have been, was December 16, 1929, thereby beginning the running of cycles of two year terms expiring December 16 of each odd year, beginning with the year 1931.

Therefore, and since the law, rather than the commission as issued controls, the term of office of the person appointed in January 1939, actually expired December 16th of that year. If no appointment has been made since, the incumbent has continued in office by virtue of the holdover provisions of the statute, and the constitution and the appointment of a successor to hold office for the term ending December 16, 1943, is now in order, no confirmation by the Senate being required.

Chapter 11972 has been amended, but not as to the term of office of the Probation Officer.

STATE PLANNING BOARD

April 18, 1941.—041-211.

APPROPRIATIONS—WITHDRAWALS

QUESTION: Section 12 of Chapter 19182, Acts of 1939, makes an appropriation of \$25,000.00 annually to the State Planning Board. The Executive Secretary of the said Board has received a check in the amount of \$5,000.00 from the Trustees of the Internal Improvement Fund of the State of Florida, which he desires to place in the State Treasury to the credit of the State Planning Board to be disbursed by warrants drawn by the State Comptroller on the State Treasury in payment of accounts of the Board. Can the State Planning Board exceed its appropriation of \$25,000.00 to the extent of the \$5,000.00 received from the Trustees of the Internal Improvement Fund?

To Hon. J. M. Lee, State Comptroller:

I am of the opinion that it cannot for the reason that when once money is deposited in the Treasury of the State of Florida, it cannot be withdrawn therefrom except in pursuance of an appropriation made by law.

I suggest that since the Legislature is in session the State Planning Board could probably secure the passage of an amendment to Section 12 of Chapter 19182 that would take care of the situation mentioned above.

STATE PLANNING BOARD

February 16, 1942.—042-85.

EMPLOYEES—MEDICAL SERVICES

QUESTION: The Florida State Planning Board is assisting in the sponsorship of the Southeast Florida Resources Investigation and as

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such co-sponsor contributes funds and other assistance towards the investigation; the paid workers making the investigation have been carried on the payrolls of different state departments, including the State Board of Conservation and the Everglades Fire Control District; Jack Collins was one of the paid workers carried on the payroll of the State Board of Conservation until about January 27, 1942, when he was transferred to the payroll of the Everglades Fire Control District; he received an injury requiring medical attention immediately after being transferred to the payroll of the Everglades Fire Control District. For the purpose of workmen's compensation in whose employ was Jack Collins?

To State Planning Board, Tallahassee, Florida:

I am of the opinion that Mr. Collins was in the employment of the Everglades Fire Control District and that he had been loaned to the investigation project. Under these circumstances, I think, for the purpose of workmen's compensation, that he was in the employ of the Everglades Fire Control District (71 C.J. 403, section 138).

I am further of the opinion that the Everglades Fire Control District is responsible for medical services rendered its employees notwithstanding the fact its employees were not covered by workmen's compensation insurance.

HOUSING AUTHORITIES LAW

February 12, 1941.—041-69.

PROPERTY—TAX EXEMPTION

QUESTION: Is property owned by the Housing Authority of the City of Jacksonville, as organized under Chapter 17981, Acts of 1937, exempt from ad valorem taxes?

To Hon. J. M. Lee, Comptroller:

I am advised by you that you are in receipt of a letter from the Housing Authority of Jacksonville requesting a ruling from your office with reference to the following Supreme Court opinions in connection with the exemptions from the ad valorem taxes on property belonging to the Housing Authority in the State of Florida, and that the following decisions have been rendered by the Supreme Court:

Marvin vs. Jacksonville Housing Authority, 133 Fla. 590, 183 So. 145.

Lott et al vs. City of Orlando et al 196, So. 313, 142 Fla. 338.

State ex rel Burbridge et al vs. St. John, 143 Fla. 544, 197 So. 131, 143 Fla. 876, 197 So. 549.

Higbee et al vs. Jacksonville Housing Authority, 143 Fla. 560, 197 So. 479.

Harper vs. McDavid, Tax Assessor Escambia County and Pensacola Housing Authority, Opinion rendered January 7th, 1941, not yet reported.

In reply I wish to advise that I shall take the cases up seriatim.

In the case of Marvin vs. Jacksonville Housing Authority, 133 Fla. 590, 183 So. 145, the Supreme Court said:

"It was clearly the intention of the Legislature by enacting Chapter 17983, Laws of Florida, Acts of 1937, that the property of a housing authority would be exempt from all ad valorem taxes."

SOCIAL WELFARE—Housing Authorities Law

The case of Lott, et al vs. City of Orlando, et al, 142 Fla. 338, 196 So. 313, did not involve the question of whether or not the Housing Authority was exempt from ad valorem taxes. The only questions raised were whether or not

"the action of the City Council of Orlando in creating a Housing Authority for the City of Orlando . . . is a public purpose."

"if a public purpose, is a responsibility to be administered by the county rather than the municipality."

"that Chapter 17981, supra, is unconstitutional and void because it violates the principle of equality and uniformity of taxation. That the area of the operation of the housing authority is extra-territorial in scope as it applies to the City of Orlando and money is unlawfully collected from the property owners within the incorporate limits of the City of Orlando and the Housing Authority property is located beyond the city limits of Orlando."

In the case of State ex rel Burbridge, et al vs. St. John 143 Fla. 544, 197 So. 131, 143 Fla. 876, 197 So. 549, the Court, in its clarifying opinion reported in 197 So. at page 549 said:

"It appears that there is confusion as to the rationale of the action of this Court in the entry of its judgment of June 28, 1940.

"The judgment of the court below was reversed and the cause remanded for further appropriate procedure.

"It has not been held by this Court that the property involved is subject to taxation. Nor has it been held by the majority of the Court that it is exempt from taxation under the provisions of Section 16, Article 16 of the Constitution. The majority of the Court does hold that under the pleadings in this case, the property is not shown to be exempt under the organic provision.

"It does not necessarily follow that property belonging to the Housing Authority of Jacksonville, Florida, may be exempt from taxation; nor does it follow that property owned by the Housing Authority of Jacksonville, Florida, is not exempt from taxation.

"Under the provisions of Section 16, Article 16, of the Constitution, if it be shown that any specific property belonging to the Housing Authority of Jacksonville, Florida, be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes, or for any one or more of such purposes, then that property is exempt from taxation, and upon a showing made to this effect by the owner the exemption should be allowed by the Assessor.

"The property owner is not a party to this suit. Therefore, the owner cannot be, by a judgment in this case, precluded from the exercise of its right to show that its property is exempt under the organic provisions, supra. Nor shall any judgment entered in this case appear to preclude the owner from the exercise of such legal right." (Emphasis Supplied).

It is very clear to me that what the Supreme Court said in its clarifying opinion of August 2nd, 1940, last above quoted, is that they did not pass upon the question of whether or not property belonging to the Housing Authority is subject to taxation for the reason the Housing Authority was not a party to said suit. The Supreme Court did direct the Tax Assessor to assess the property because there was no allegation appearing in the pleadings that the property of the Housing Authority was exempt. However, the Supreme Court added this that I think is

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controlling and gives the Tax Assessor a guide to follow in the relation to the Housing Authority of Jacksonville when it said:

"Therefore, under the allegations in the pleadings, the relator is entitled to have judgment requiring the Tax Assessor to enter the assessment of the involved property on the tax books, *unless the owner may show unto the assessor that the property is exempt from taxation under the organic provisions, supra. This is necessary because the owner is not a party to this cause.*" (Emphasis Supplied.)

Under this decision, the Housing Authority would have the right to show

"unto the Assessor that the property is exempt from taxation under the organic provisions . . ."

In the case of Higbee, et al vs. Jacksonville Housing Authority, 143 Fla. 560, 197 So. 479, there was no question of the right of a housing authority to be exempt from ad valorem taxation involved. The only questions involved were with relation to the financing of the Housing Authority of Jacksonville, and whether or not the Housing Authority and the City of Jacksonville could enter into an agreement with the Housing Authority concerning the elimination of certain unsafe buildings. Therefore, this case gives me no trouble with reference to the question you have propounded.

In the case of Harper vs. McDavid, Tax Assessor, Escambia County, and Pensacola Housing Authority, opinion rendered under date of January 7th, 1941, the Supreme Court has very definitely and positively settled this question.

In this case the Supreme Court had before it the question that you have asked my advice upon with reference to the Housing Authority of the City of Pensacola. This particular Housing Authority was set up under Chapter 17981, Acts of 1937, which is the general Act relating to Housing Authorities, and under which the Housing Authority of the City of Jacksonville became a body corporate. In answer to the contention raised that Chapter 17983, which is the exemption statute, was unconstitutional, the Court said:

"What constituted a municipal purpose is a legislative question that should not be interfered with by the courts in the absence of a clear abuse of discretion. A municipal purpose is much broader in its scope than it was a generation ago. Under our system of jurisprudence constitutional validity may be determined by practical operation and effect. Measured by this test, we cannot say that the Legislature exceeded its power in pronouncing the properties of the *Housing Authority* held for a municipal purpose free from all forms of taxation. They are held not for profit, must be restricted to a low income group, and contribute materially to the health, morals, safety, and general welfare of the people. They aid materially in reducing the cost of fire prevention and police protection and the Housing Authority is authorized to make annual compensation to the City in lieu of taxes and other services furnished. There is no suggestion that the officers charged with the administration of the present scheme have failed in their duty and being so, we must assume that the law has been faithfully observed."

I, therefore, am of the opinion that the Tax Assessors of the State of Florida would be warranted in exempting from taxation the properties held by the Housing Authorities in the State of Florida whenever such claim is made with proof to the Tax Assessor that they are organized and set up as the Housing Authority of the City of Pensacola, and that the

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case of *Harper vs. McDavid*, Tax Assessor of Escambia County, and the Housing Authority of the City of Pensacola, supra, is their authority for so doing.

HOUSING AUTHORITIES LAW

December 4, 1941.—041-669.

RECORDING FEES—WAIVER BY BOARDS OF COUNTY COMMISSIONERS

QUESTION: Have Boards of County Commissioners authority under Florida law to waive recording fees for deeds and other instruments in cooperation with Rural Housing Authorities?

To Hon. Ammon McClellan, State Housing Coordinator:

I am unable to find any Florida Statute giving such authority to Boards of County Commissioners.

HOUSING AUTHORITIES LAW

November 4, 1941.—041-631.

REGIONAL HOUSING AUTHORITY—CREATION—PROCEDURE

QUESTION: (1) Does the filing of an original of a certificate of the Regional Housing Authority cure irregularities in complying with the provisions of Section 1 (Section 29) of Chapter 20220, Acts of 1941?

(2) In the creation of a regional housing authority, comprising 21 counties, the Clerks of three counties failed to give notice of the time, place and purpose of the public hearing ten days prior to the day on which the hearing was to be held. Is this failure to publish a fatal defect in the face of the provisions of Section 30 that "such certificates shall be conclusive evidence of the due and proper appointment of such Commissioner"?

To Ammon McClellan, Esquire, Executive Director, Northwest Florida Regional Housing Authority, Marianna, Florida:

(1) Section 1 (Section 30) of that Chapter provides:

"When a regional housing authority has been created as provided above, the Governor shall thereupon appoint one qualified elector from each county in such regional housing authority as a commissioner of the regional housing authority."

"A certificate of the appointment of any commissioner of a regional housing authority shall be filed with the county clerk, and such certificate shall be conclusive evidence of the due and proper appointment of such commissioner."

The latter provision cannot be said to cure irregularities in complying with the provisions of Section 1 (Section 29) but a certificate of the appointment of a commissioner would probably be regarded as prima facie evidence of the due and proper appointment of the commissioner although the statute uses the words "conclusive evidence." The Courts have generally held that the Legislature has no power to declare what shall be conclusive evidence as that would be an invasion of the power of the judiciary.

(2) In my opinion the provision in Section 1 (Section 30) that "such certificate shall be conclusive evidence of the due and proper appointment of such commissioner" would not have the effect of curing the irregularity with respect to the ten day notice required by the statute.

CHAPTER XXIII

LABOR

WORKMEN'S COMPENSATION LAW

August 27, 1942.—042-421.

APPEALS—JURISDICTION—INJURY OCCURRING OUTSIDE STATE OF FLORIDA

QUESTION: To what court should an appeal be made returnable in those cases where the injury occurred outside the state of Florida and the employee was covered under the Florida Workmen's Compensation Law?

To Florida Industrial Commission:

Section 440.27 (1) Florida Statutes 1941, provides that either party to a workmen's compensation claim may appeal from the Commission's orders as a matter of right.

Jurisdiction of such appeals is vested in the circuit courts of the state, and subparagraph 3 of the foregoing section provides that such an appeal may be taken to the circuit court in the circuit where the injury occurred.

The Workmen's Compensation Law does not specify to which circuit court the appeal should be taken where the injury occurs outside the state of Florida. Therefore, since the parties may appeal as a matter of right, we must look to the general law in order to ascertain the proper circuit court to which the appeal should be taken.

Section 46.01 Florida Statutes, 1941, provides that suits shall be begun only in the county where the defendant resides, or where the cause of action accrued, or where the property in litigation is located.

Section 42.04 Florida Statutes, 1941, provides that suits against domestic corporations shall be commenced only in the county where such corporation shall have or usually keep an office for the transaction of its customary business, or where the cause of action accrued, or where the property in litigation is located. The same section further provides that where the defendant is a foreign corporation doing business in this state, suits shall be commenced in a county where such company may have an agent or other representative, or where the cause of action accrued, or where the property in litigation is situated.

Where statutory administrative proceedings are had before administrative officers, boards, commissions, or other tribunals, with statutory appeals to the circuit courts, such proceedings may not appear in the judicial department of the state government as a judicial "case" until they are brought to the circuit court by appeals. Therefore, the "case" may fairly be regarded as "originating" in the circuit court through a statutory appeal from the administrative board. *South Atlantic S.S. Company vs. Tutson*, 139 Fla. 405, 190 So. 675, 682.

The term "case" as hereinbefore used, has been defined by our Supreme Court as follows:

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"The words 'case' or 'cause' when used as legal terms are generally understood as meaning a judicial proceeding for the determination of a controversy between parties wherein rights are enforced or protected or wrongs are prevented or redressed."

Ex parte Chesser, 93 Fla. 590, 112 So. 87.

While the terms "case", "cause" and "suit" may have somewhat different technical meanings, they are generally understood and considered as synonymous when used as legal terms.

It is therefore my opinion that in workmen's compensation cases where the injury occurred outside the State of Florida, appeals from the Commission's orders therein should be taken to the appropriate circuit court as determined by the facts of the particular case pursuant to the provisions of the general venue statutes hereinbefore referred to, treating the appellee in said appeal as the defendant within the contemplation of the said venue statutes.

WORKMEN'S COMPENSATION LAW

May 29, 1942.—042-276.

ASSESSMENTS—AGAINST GOVERNMENTAL AGENCIES

QUESTION: Is the Workmen's Compensation Division of the Florida Industrial Commission entitled to assess municipalities, State boards, bureaus, departments and agencies on their entire payroll, both proprietary and governmental, under the provisions of Section 51 of the Workmen's Compensation Act?

To Florida Industrial Commission:

Section 51 provides that the total expenses of administering the Act shall be pro-rated among insurance companies writing compensation insurance in the State and self-insurers. Under this provision assessments are made against the insurance companies and self-insurers, and the proceeds therefrom are paid into the administrative fund provided for by Section 50 of the Act. The State Treasurer is made custodian of this fund, and as such is required to give a special bond in an amount to be approved by the Florida Industrial Commission. His ordinary bond as State Treasurer and custodian of the State funds does not cover this particular fund. The Act also specifically provides that said fund shall not be the money or property of the State. These assessments are not collected by warrant as taxes are, but are collected by civil suit if not voluntarily paid.

The State and all political subdivisions thereof are specifically included within the definition of "employer" in the Act. Also, the State, its boards, bureaus, departments and agencies, and all its political subdivisions which employ labor, are deemed self-insurers under the Act unless they elect to procure and maintain compensation insurance, in which event they are specifically authorized to pay the premiums therefor.

The Insurance Commissioner is authorized by the Act to set the premium rates for compensation insurance, and I have been informed by his office that the rates so established carry an overcharge or allowance which contemplates the assessment for the benefit of the administrative fund.

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Thus all employers who maintain compensation insurance actually pay as a part of the premium therefor the assessment made for the benefit of the administrative fund. The amount of this assessment is determined by the amount established as necessary for the administration of the Act for six-months periods and then pro-rated among all the carriers and self-insurers. If some self-insurers are not being assessed, then obviously the expense of administering the Act must be borne by those who are assessed. Thus the more carriers and self-insurers contributing to the administrative fund, the smaller the assessments should be. If some are assessed and others are not, there will be discrimination in making the assessments.

With regard to their proprietary payrolls, municipalities, State boards, bureaus, etc., which are self-insurers are unquestionably liable for the payment of this assessment, just as private employers who are self-insurers are liable for its payment.

With regard to their governmental payrolls, they are likewise, in my opinion, liable for the payment of the assessment, because in the first place, this assessment cannot be considered as a tax, since a tax is a levy for funds to go into the government treasury to be used to support the government, while here the fund is not the property of the State but is a trust fund to defray the expense of administering the Act for the benefit of employers and employees. In the second place, if this assessment were considered to be a tax, it would, in my opinion, be an excise tax and not a property tax. It is not assessed against any property, nor does it depend upon the value of any particular property. Organic and statutory provisions of our law exempting municipalities and governmental entities from taxation, apply to property taxes and not to excise taxes. The Constitution exempts from taxation not municipal or governmental entities as such, but property that is held and used exclusively by them for governmental purposes. Such exception or exemption is not an inhibition against excises.

It is, therefore, my opinion that *all* employers under the Workmen's Compensation Act who are self-insurers are liable for the assessment for the benefit of the administrative fund of the Workmen's Compensation Division of the Florida Industrial Commission on both governmental and proprietary payrolls.

Any opinion heretofore rendered by this office in conflict herewith is hereby specifically rescinded.

WORKMEN'S COMPENSATION LAW

June 3, 1941.—041-305.

AWARD—ENFORCEMENT

QUESTION: What type of order is to be entered by a Circuit Court under Sub-section (c) of Section 27 of the Florida Workmen's Compensation Act, for the purpose of enforcing an award of the Florida Industrial Commission which has become final?

To Hon. Walter E. Rountree, Director, Workmen's Compensation Division, Florida Industrial Commission:

Sub-section (c) of section 27 of the Florida Workmen's Compensation Act provides as follows:

"(c) If any employer or his officer or agents fails to comply with a compensation order making an award, that has become final, any bene-

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ficiary of such award or the Commission may apply for the enforcement of the order to the Circuit Court for the district in which the injury occurred. If the Court determines that the order was made and served in accordance with law and that such employer or his officers or agents have failed to comply therewith the Court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order."

In hearing and passing upon compensation claims under the Florida Workmen's Compensation Act, the Florida Industrial Commission "hears the evidence and makes an award that may be re-heard and enforced if a proper award, only by a Circuit Court, which is the first Court in which the controversy may appear in the judicial department." See South Atlantic S. S. Co. of Delaware vs. Tutson, 139 Fla. 405, 190 So. 675.

In the above cited case the Supreme Court of Florida said:

"The Workmen's Compensation Law does not clearly confer 'judicial power' upon the Florida Industrial Commission in administering the law, as may be done under Section 1, Article V (of the Constitution) as amended; and such Commission now has administrative authority and duties only. Though the Commission has some procedural authority which may be regarded as quasi judicial to be exerted as an incident to, and in aid of, the administrative authority conferred, such Commission is essentially an administrative body. *It has no authority to enforce its own orders or awards. This is done by the Circuit Court in the exercise of criminal or supervisory jurisdiction*, under Section 11, Article V, Constitution."

The Florida Workmen's Compensation Act provides for an appeal to the Circuit Court from an award of the Florida Industrial Commission. In the event no such appeal is taken within thirty days, the award becomes final. See Section 27 (a) and (b) of the Compensation Act.

Where an award has thus become final it is conclusive as to defenses existing on the merits anterior to the making of the award.

After such an award has become final it then becomes quite similar to a foreign judgment or judgment obtained in another State.

It is my opinion that the proper procedure for enforcing an award of the Florida Industrial Commission which has become final is by bringing an action in the Circuit Court on such award so that the Circuit Court may determine that the order was made and served in accordance with the law and that the employer, or his officers, or agents have failed to comply therewith and thus make the award of the Commission the judgment of the Circuit Court.

After the Circuit Court has thus made the award its own judgment, the Court may, in my opinion, enforce obedience thereto by writ of injunction or other process, mandatory or otherwise.

It is my opinion that sub-section (c) of section 27 of the Florida Workmen's Compensation Law contemplates that the Circuit Court must first make the award the judgment of the Circuit Court before it can proceed to enforce it.

The judgment may then be enforced, in my opinion, by execution or otherwise as provided in sub-section (c) of section 27. The sub-section authorizes enforcement by mandatory injunction, whereas man-

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datory injunction, except in rare cases, will not be ordered until after final hearing, and then only to execute *the judgment or decree of the Court*. Florida East Coast Railway Company vs. Taylor, 56 Fla. 788, 47 So. 345. This would further indicate that the award must first be made the judgment of the Circuit Court before it can be thus enforced.

If, after judgment has been obtained in the Circuit Court, the employer has put his or its property beyond reach of ordinary process of the Court, such property may nevertheless, in my opinion, be reached under existing provisions of law affecting such situations. In other words, the judgment of the Circuit Court could then be enforced just as any other judgment of the Court may be enforced.

It is my opinion that on proper showing, in an appropriate proceeding, after judgment is obtained in the Circuit Court on the award of the Industrial Commission which has become final, the Circuit Court may require, by mandatory injunction, the property of the employer, which has been put beyond reach of process of the Court for the purpose of defeating the judgment or award, to be returned to the employer and subjected to payment of the judgment. Of course, the Court may enforce compliance with such injunction by means of contempt proceedings.

In his letter to this office, Mr. Brewton requested that we furnish him with a copy of any order for the enforcement of an award which may have been entered in some proceeding in which this office appeared for the Commission. In response to that request, we do not find that the services of this office have been invoked in such a proceeding.

WORKMEN'S COMPENSATION LAW

August 15, 1941.—041-523.

BOOTBLACK—EMPLOYEE OF BARBER SHOP

QUESTION: The owner of a particular barber shop employs three barbers. In this shop there is a bootblack who operates exclusively therein. He purchases all of his materials, such as shoe polish, brushes, rags, etc. His compensation for the work performed comes from the patrons of the shop who hire him to shine their shoes. The owner of the shop furnishes the bootblack's shoe shine stand or chair without cost to the bootblack. However, the bootblack must perform the services ordinarily performed by a porter for the right to operate within said shop; that is, he must sweep the floor, keep the shop clean, remove the aprons from the patrons, and do other chores as directed by the owner of the shop. He must perform services for all patrons of the shop at their request. He is under the direction and control of the owner of the shop as to the hours he must be available to perform such services. Although the bootblack receives his compensation only from patrons who frequent or visit the shop, it is an added service of the shop and has by custom become an integral part of the service performed and expected by the public to be obtained in barber shops. Is the bootblack an employee of the barber shop within the meaning of the Workmen's Compensation Act?

To Florida Industrial Commission:

Subsection (2) of Section 2 of the Florida Workmen's Compensation Act as amended in 1941 provides as follows:

"The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship,

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express or implied, oral or written, including aliens, and also including minors whether lawfully or unlawfully employed, but excluding independent contractors and excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer."

It is my opinion that the bootblack described above is an employee of the barber shop within the meaning of the Workmen's Compensation Act. It appears to me that there is a right on the part of the owner of the shop to control the manner in which the bootblack's work is to be done, and that the bootblack is subject to the will of the owner of the shop under such circumstances as to constitute a contract of employment rather than an independent contractor relationship.

WORKMEN'S COMPENSATION LAW

September 4, 1941.—041-547.

BOTTLING COMPANY DISTRIBUTOR—EMPLOYEE

QUESTION: Under the terms of a contract, as hereinbelow set forth, between a bottling company and a distributor of the bottling company's products, is the distributor an employee of the bottling company rather than an independent contractor?

To Florida Industrial Commission:

The distributor is required to collect and carry on accounts with customers and to assume all losses that may occur in the collection thereof. The bottling company agrees to furnish and service a motor truck for the distributor solely for his use in selling and marketing products of the company to the retailers in the distributor's territory. The distributor agrees to obey the company rules, regulations and requests in the matter of the use, care, maintenance and operation of said truck. The company agrees to supply oil, gas and insurance on the truck and maintain it in operating condition at a fixed rental. The company has the exclusive right to assign routes and increase, decrease, re-assign or re-arrange the territory of the distributor. The distributor is not allowed to sell the product to persons residing outside the territory allotted to him.

It is my opinion that under the above contract the bottling company has a right to control the manner in which the work of the distributor is to be done, and the distributor is subject to the will of the company under such circumstances as to render the distributor an employee rather than an independent contractor.

WORKMEN'S COMPENSATION LAW

August 16, 1941.—041-524.

CADDY—EMPLOYEE OF GOLF CLUB

QUESTION: Do caddies who are kept in a caddy pen until called out at the request of the player, but while in said pen and on the golf course are under the supervision of the golf club so far as their conduct is concerned, but are paid for their services direct by the player, the amount of which is fixed by the club, come within the terms of the Workmen's Compensation Act and are they employees of the golf club?

LABOR—Workmen's Compensation Law*To Florida Industrial Commission:*

It is my opinion that a caddy working under the conditions outlined above is an employee of the golf club where he works and therefore comes within the provisions of the Workmen's Compensation Act. This view finds support in the decisions in the cases of Claremont Country Club vs. Industrial Accident Commission, 163 Pacific 209, Essex County Country Club vs. Chapman, 173 Atlantic 591, and Indian Hill Club vs. Industrial Commission, 140 N. E. 871.

WORKMEN'S COMPENSATION LAW

August 20, 1941.—041-527.

**CARRIERS—REQUIREMENTS CONCERNING EXTENSION OF
COVERAGE—APPLICABILITY THEREOF**

QUESTION: It is the rule of insurance companies writing Workmen's Compensation Insurance that under no circumstances shall a policy be written to cover only a part of a specific location of a given risk, leaving another part of the same location uninsured. The entire operations of any one employer at a specific location shall be covered by a single policy. Policies shall be written upon the basis of the entire payroll for the operations of the employer which are the subject of insurance. A certain individual operates a packing house and on premises adjacent thereto a partnership, of which the packing house operator is a member, operates a farm. The two businesses are entirely separate and there is no interchange of labor between them. The packing house operator has elected to bring his packing house under the provisions of the Workmen's Compensation Act. The insurance company contends that insurance must be carried on the farm as well as the packing house if either is to be insured. Is the aforesaid rule applicable under the facts stated above and should it be applied so as to require the packing house and the farm both to be covered in a single policy?

To Florida Industrial Commission:

The rule is not unreasonable or improper. It is undoubtedly intended to eliminate confusion with regard to the extent of coverage under particular compensation policies. For example, if a single employer were to hire two types of labor on the same premises, one exempt and the other non-exempt, there is considerable possibility that by reason of the confusion which must necessarily exist under such circumstances the insurance carrier might be called upon to pay, or at least to defend against, claims for which it received no compensation in the way of insurance premiums and had not contracted to cover in its policy.

However, assuming the facts set forth to be true, the reason for the rule would not apply. It is therefore my opinion, predicated upon a state of facts in which it is shown that the two businesses involved are entirely separate and distinct and there could be no practical problem from confusion, that the rule of the insurance carrier aforesaid should not be applied to such facts or situation. As a matter of fact, if it is applied, it would in my opinion violate Subsection 4 of Section 38 of the Workmen's Compensation Act prohibiting a rating organization or insurer from charging any rate which discriminates unfairly between risks within this state of essentially the same hazards.

LABOR—Workmen's Compensation Law**WORKMEN'S COMPENSATION LAW**

August 7, 1942.—042-389.

CLAIMS—TIME FOR FILING

QUESTION: Section 440.19 (1), Florida Statutes 1941, provides in part that compensation for disability under Florida Workmen's Compensation Act shall be barred unless a claim therefor is filed "within one year after the time of injury."

This provision was in full force and effect on June 13, 1940, on which date an employee of the State Road Department sustained an injury on which no claim was filed by said injured employee within one year after the time of such injury, either with the Department or with the Florida Industrial Commission.

No time was lost by said employee by reason of such injury during the one-year period. However, the injury aforesaid has now become disabling, and claim has been made or may be made by said employee for compensation and medical benefits under the provisions of the Workmen's Compensation Law.

With reference to the foregoing facts, does the one-year limitation for filing a claim for injury begin to run from the date of the injury or from the date such injury becomes disabling?

To State Road Department of Florida:

The determination of your question depends upon the construction or interpretation of the phrase "time of injury." In other words, does this term mean the time the injury becomes disabling, or does it have reference to the time of the accident causing the injury?

It so happens that the Legislature, when it enacted the Workmen's Compensation Law, left no grounds for a construction of the quoted phrase, because the Legislature itself, in Section 2, Paragraph 18 of the Workmen's Compensation Act (Section 440.02 (18), Florida Statutes, 1941) adopted the following definition:

"(18) The term 'time of injury' means the time of the occurrence of the accident resulting in the injury."

It is therefore my opinion that the legislative definition must be followed, and such claims must be filed within one year after the occurrence of the accident resulting in the injury, otherwise the right to compensation for disability under the Workmen's Compensation Act is barred.

WORKMEN'S COMPENSATION LAW

July 6, 1942.—042-336.

COMPENSATION—INSURANCE RATES

QUESTION: The Workmen's Compensation Act, under Section 38 (d) 2, provides, among other things, that:

"... No insurer shall grant any decrease or make any increase in the rate approved as reasonable and adequate by the Insurance Commissioner except such as may result from the application of the approved schedule or experience rating plan."

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Paragraph 4 of the General Rules of the Workmen's Compensation Manual, issued by the National Council on Compensation Insurance for the use of its members provides:

"This manual and all amendments thereto, unless otherwise specifically provided, shall be applied to all policies as of the first normal anniversary rating date of the risk, as established by the Board or Bureau having jurisdiction, which is on or after the specified date, but shall not otherwise be available to outstanding policies. No policy may be cancelled and rewritten for the purpose of avoiding this rule. If a policy is cancelled and rewritten, the new policy (whether issued by the same or any other company) must carry the classifications and rates applicable to the cancelled policy until the normal anniversary rating date of the risk. Such new policy shall be endorsed to provide that the amended rules, classifications or rates shall be applied from such normal anniversary rating date."

The rates applicable to this type of insurance in Florida are adjusted as of July 1st each year. Prior to July 1, 1942, an overall reduction of 10.8% of the manual rates was ordered by the Insurance Commissioner, effective July 1.

An insured employer seeking to get the benefit of the reduced rates requested his insurance company to cancel his existing policy and issue a new one to him under the new and reduced rates. The insurance company contends that it cannot write a new policy under the reduced rates without violating paragraph 4, General Instructions of the General Rules, contained in the Workmen's Compensation Manual hereinabove quoted.

Would a policy written on the basis outlined above be contrary to the laws of the State of Florida?

To Hon. J. Edwin Larson, Insurance Commissioner:

I do not see any reason why we should be concerned with the General Rules of the Workmen's Compensation Manual issued by the National Council on Compensation Insurance for the use of its members. I, therefore, limit this opinion strictly to the provision of the Florida Workmen's Compensation law quoted by you, which seems to me to contemplate that when any decrease or increase is made in the rate approved as reasonable and adequate by the Insurance Commissioner, that all policies thereafter should be adjusted accordingly.

I, therefore, am of the opinion that there is no prohibition contained in the laws of the State of Florida upon the writing of a policy as described.

WORKMEN'S COMPENSATION LAW

October 22, 1941.—041-609.

COOPERATIVES AND MEMBERS—RELATIONSHIP

QUESTION: Does the relationship of employer and employee exist between a Cooperative and its members who work in the business thereof without additional remuneration?

To Florida Industrial Commission:

It appears from the enclosure in your letter that the Cooperative in question consists of about eighty members, and every three months

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so-called officers of the Cooperative are elected, and such officers, although employed elsewhere, take turns working in the grocery and provisions store operated by the Cooperative. The enclosure likewise discloses that such elections are held every three months in order that all members of the Cooperative may be sure of an opportunity of working in the store. It appears that none of the members, while acting as such officers and working in the store, receive any salary therefor or any remuneration in addition to that received by the other members. Quarterly statements are prepared for the benefit of the members, and once a year the proceeds, if any, are divided equally among the members of the Cooperative. We understand from the enclosure that the Cooperative in question is not incorporated.

Ordinarily, partners and co-adventurers in business do not sustain the relation of employer and employee, on the theory, it is said, that no one can at once be both. Certainly this is true if the members of a partnership worked for the partnership but received no remuneration therefor over and above the profits of the business.

In view of the facts disclosed in the enclosure contained in your letter the members of the Cooperative are not employees of the Cooperative entitled to benefits under the Workmen's Compensation Act.

WORKMEN'S COMPENSATION LAW

November 5, 1941.—041-633.

"CURB GIRLS"—EMPLOYEES OF EATING PLACES

QUESTION: Are "Curb Girls" employees or independent contractors with particular reference to the facts set out below?

To Florida Industrial Commission:

It appears from the facts presented that the establishment in question has a number of "curb girls" who do not receive any cash remuneration whatsoever and wait strictly on the automobile trade. These girls pay in cash for all orders received from the kitchen and charge the customer at the retail price, deriving their income from the difference between the retail and the wholesale price together with what tips they receive. It further appears that each girl has a certain period of time when she is required to work, but if for some reason or other she decides in the middle of her shift that she does not wish to continue it, she is free to leave when she pleases. However, it also appears that if one of the girls makes a habit of leaving in the middle of her shift, the operator of the enterprise would ask her not to return because her habit in leaving her work would interfere with the operation of his business. The girls are permitted to exchange shifts for personal reasons if they so desire. There is also some information in your communication which indicates that the girls' remuneration is on a commission basis of 5% on each individual order of 25c or more, which is termed by the operator of the enterprise as a discount, rather than a commission, because the girl is required to pay for the orders before she leaves the kitchen, and if anything happens to the order en route to the car, such as spilling or overturning the tray, she would be required to replace it at her own expense.

Under our Workmen's Compensation Act an employee is defined as meaning:

"Every person engaged in any employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written,

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including aliens, and also including minors whether lawfully or unlawfully employed, but excluding the independent contractors and excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer."

Obviously, the "curb girls," as described in your communication, are employed under the above definition unless they are to be considered as independent contractors.

Under the facts presented, it appears to me that the one who operates the place of business where the "curb girls" in question work, to a very definite extent controls the manner in which the work is to be done, the time when the girls are required to work, and undoubtedly he determines the price for which his merchandise is to be sold to the customers. While it is true that the girls, while working a designated shift, may leave at any time they please, they thereby run the risk of being dismissed for interfering with the operator's business. The mere fact that the girls' remuneration is on a commission basis, supplemented by tips, is not sufficient to render them independent contractors rather than employees.

It is my opinion that, under the facts presented and set out above, the operator of the enterprise in question has a right to control the manner in which the work of the "curb girls" is to be done, and the "curb girls" are subject to the will of such operator under such circumstances as to render them employees of such operator rather than independent contractors.

WORKMEN'S COMPENSATION LAW

August 18, 1941.—041-525.

DEPUTY MUNICIPAL POLICE OFFICERS—COMPENSATION

QUESTION: Are deputy municipal police officers who are subject to call by the regular officers in case they need assistance in answering police calls, and who receive no monetary compensation unless they should be used for several days, or unless the particular job they are called on requires subsequent attendance at Court, covered by the Workmen's Compensation Act?

To Florida Industrial Commission:

Subsection (1) of Section 2 of the Workmen's Compensation Act as amended in 1941 provides that the term "employment" shall include employment by the State and all political subdivisions thereof. This would include municipal corporations.

Subsection (2) of the same section provides as follows:

"The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also including minors whether lawfully or unlawfully employed, but excluding independent contractors and excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer."

By the terms of this last quoted provision of the Act, an employment in order to be excluded must be *both* casual and *not* in the course of the trade, business, profession or occupation of the employer.

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Although a special deputy municipal police officer's employment may be casual, his service rendered as such in keeping the peace is in my opinion in the course of the trade, business, profession or occupation of the municipality for which he renders such service.

However, the right to compensation is an essential factor in determining liability under the Act. The term "employee" is understood to mean one who works for another for wages or salary and the right, therefore, to demand pay for his services from his employer would appear to be essential to the employee's right to receive compensation under our Workmen's Compensation Act in case of injury sustained by an accident occurring out of and in the course of the employment.

It is, therefore, my opinion that special deputy municipal police officers as described by you come within the protection afforded by our Workmen's Compensation Act while rendering services as such police officers for which they would be entitled to receive payment.

WORKMEN'S COMPENSATION LAW

August 4, 1941.—041-518.

EMPLOYEES—COMMON CARRIERS—COMPENSATION

QUESTION: Are employees of common carriers by railroad or express companies engaged in intrastate, interstate, or foreign commerce, entitled to claim benefits under the Florida Workmen's Compensation Act, regardless of the nature of their duties?

To Florida Industrial Commission:

Section 9 (b) of the Florida Workmen's Compensation Act provides as follows:

"No compensation shall be payable in respect of the disability or death of an employee of a common carrier by railroad or express company engaged in intrastate, interstate, or foreign commerce."

In my opinion, the foregoing section of the Florida Workmen's Compensation Act excludes all employees of such common carriers from the benefits prescribed in said Act. The nature of the duties of such employees would be immaterial so long as they are in the employ of common carriers by railroad or express company engaged in intrastate, interstate, or foreign commerce.

WORKMEN'S COMPENSATION LAW

August 20, 1941.—041-528.

EMPLOYEES—COUNTY—INSURANCE COVERAGE

QUESTION: (1) Does an insurance policy covering county employees cover deputy clerks of Circuit Court and deputy sheriffs of the county having such policy?

(2) Does a physician employed by the county to give attention to certain cases in addition to his regular practice, come within the provisions of the policy covering county employees?

To Florida Industrial Commission:

(1) Deputy clerks of the Circuit Court and deputy sheriffs are employees of the county and therefore are protected by a policy of insurance which purports to cover all county employees.

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(2) The physician to whom you refer is a county employee and is within the protection afforded by a policy purporting to cover county employees while engaged in that part of his practice for which he is paid by the county, but not with respect to his regular practice.

WORKMEN'S COMPENSATION LAW

January 9, 1942.—042-17.

EMPLOYEES—GROVE WORKERS—EXEMPTION

QUESTION: Are citrus grove workers employees within the purview of the 1941 amendment to the Workmen's Compensation Act?

To Florida Industrial Commission:

Section 2 of Chapter 18413, Laws of Florida, Acts of 1937 (Florida Workmen's Compensation Act) defined "employment" as all private employment in which three or more employees are regularly employed in the same business or establishment except "agricultural and horticultural farm labor." This exception was further defined as including "all labor employed in the production and handling of agricultural and horticultural products in their natural and fresh state whether the same be engaged in picking, gathering, harvesting, processing, packing, canning or handling thereof, or in the hauling of same from the grove or field to the packing house or cannery."

Horticulture is "the department of the science of agriculture which relates to the cultivation of gardens or orchards, including the care of vegetables, fruit, flowers, and ornamental shrubs and trees."

After giving the above definition of horticulture, the Superior Court of Pennsylvania, in the case of *Bucher vs. American Fruit Growers Company*, 163 Atl. 33, went on to say that in common parlance it is unquestioned that agriculture would be considered as including fruit growing, and if it is correct that horticulture is one department of agriculture, then agriculture must include horticulture. The Pennsylvania Court further said that occupations of growing fruit and of raising other crops are so allied to each other, and the character and condition of labor required so identical in each case, that it could see every reason why a laborer in fruit growing should be treated and classified in the same way under the Workmen's Compensation Act as a laborer on a farm which grew crops other than fruit.

The Pennsylvania Court in the above case was considering an Act quite similar to ours, and held that the words "agricultural workers," and the phrase "engaged in agriculture," legally construed, would include fruit growing—the care, maintenance and cultivation of orchards and the harvesting, storage and shipping of the fruit raised therein, and that there was nothing in the Act to indicate an intention to distinguish grain growers and their employees from fruit or vegetable growers and their employed laborers.

However, the 1941 Florida Legislature amended our Workmen's Compensation Act by enacting Chapter 20672, Laws of Florida, Acts of 1941, and by this Amendment Section 2 of the Act now defines "employment" as all private employment in which three or more employees are employed in the same business or establishment, except "agricultural farm labor." This Amendment deleted from the prior Act all reference to horticultural farm labor, (and likewise deleted from the definition all reference to labor) employed in picking, gathering, harvesting, processing, packing, canning, handling, or hauling horticultural products in

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their natural or fresh state from the field or grove to the packing house or cannery.

Upon first considering the foregoing Amendment, it was my opinion that the Legislature intended to limit the exception strictly to what is commonly accepted as agricultural farm labor, and that horticultural farm labor therefore came within the provisions of the Act. In other words, my first reaction was that by this deletion the Legislature had in effect said that all agricultural farm labor except horticultural farm labor is exempted from the provisions of the Workmen's Compensation Act.

However, upon more mature consideration, and finding no specific provision in the Act indicating a definite intention to bring citrus workers within the provisions of the Act, and further feeling that such former interpretation might possibly subject the Act to attack on the grounds of discrimination, it is my considered opinion that the Legislature, by retaining the broad term "agricultural farm labor," has likewise retained horticultural farm labor within the exemption, and therefore employees who do spraying, pruning, and general cultivation of groves, would be engaged in agricultural farm labor, and their employer would not be required to comply with the provisions of the Florida Workmen's Compensation Act, whether the groves upon which they work are owned by their employer or by others.

Any previous opinions heretofore rendered by this office in conflict herewith are hereby specifically rescinded and overruled.

WORKMEN'S COMPENSATION LAW

August 12, 1941.—041-520.

EMPLOYEES—RIGHT TO WAGES—ESSENTIAL ELEMENT OF EMPLOYMENT

QUESTION: If an employer has a relative working for him with or without pay, and has two other employees, must such employer comply with the provisions of the Florida Workmen's Compensation Act?

To Florida Industrial Commission:

Section 2 of the Florida Workmen's Compensation Act as amended in 1941 provides in part as follows:

"When used in this Act—

"(1) The term 'employment' includes employment by the State and all political subdivisions thereof and all public and quasi-public corporations therein and all private employments in which three or more employees are employed in the same business or establishment . . .

"(2) The term 'employee' means every person engaged in an employment under any appointment or *contract of hire* or apprenticeship, express or implied . . ."

The provision used in our Act with reference to "employee" as quoted above, is identical with the corresponding provision of the North Carolina Workmen's Compensation Act which was discussed and construed by the Supreme Court of North Carolina in the case of *Hallowell vs. North Carolina Department of Conservation*, 173 S.E. 603, wherein the Court said:

"The sum of the whole matter is that before the provisions of the Workmen's Compensation Act are called into play, the relation of master

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and servant, or employer and employee, or some appointment, must exist, and this is the initial fact to be established. An 'employee' is one who works for another for wages or salary, and the right to demand pay for his services from his employer would seem to be essential to his right to receive compensation under the Workmen's Compensation Act, in case of injury sustained by accident arising out of and in the course of the employment."

This same principle has been enunciated by many courts of last resort.

Section 14 of the Act deals with the method of determination of compensation of an injured employee, which compensation is based upon the rate of pay being received by the employee at the time of injury in the employment in which he was engaged.

Under the foregoing authorities and citations it appears to be clear that the term "employee" as used in the Act has reference only to those employees receiving wages.

Therefore, an employer who has three persons working for him, one of whom is a relative working without pay, would not come within the provisions of the Act.

Of course, if the relative receives pay for his labors he would be the same as any other employee and the employer of such a relative under such circumstances would be subject to the provisions of the Act.

WORKMEN'S COMPENSATION LAW

August 6, 1941.—041-519.

EMPLOYERS—NOTICE OF CANCELLATION

QUESTION: What is the status of a carrier where the employer has surrendered his Workmen's Compensation Insurance Policy to the carrier and requested cancellation thereof? Is such a cancellation effective immediately or at the expiration of the thirty days provided for in Section 42 (b) of the Workmen's Compensation Act?

To Florida Industrial Commission:

The purpose of the requirement for thirty days' notice by the carrier to the employer is to enable the employer to replace the coverage before the cancellation of the policy becomes effective. However, in my opinion, Section 42 (b) of the Act has a twofold purpose. The first is as indicated above. The second is to provide the Florida Industrial Commission with sufficient notice to enable it to take such steps as may be necessary to enforce the provisions of the Act requiring employers to secure the payment of compensation awards. Under this second purpose, it is essential that notice of cancellation be given to the Commission whenever the employer desires to cancel the insurance.

It is my opinion, therefore, that either the employer or the carrier must give the thirty days' notice to the Commission required by Section 42 (b) as a prerequisite to cancellation of the policy and terminating liability thereunder. This view finds support in the decision of the Supreme Court of Indiana in the case of *American Employers' Insurance Company vs. Huffman*, 187 N. E. 410.

LABOR—Workmen's Compensation Law**WORKMEN'S COMPENSATION LAW**

August 13th, 1941.—041-521.

**EMPLOYERS—STATUS UPON EMPLOYEE'S REJECTION
OF PROVISIONS**

QUESTION: Will an employer having three employees, two of whom have rejected the provisions of the Act in accordance with Section 5 (b) thereof, be considered as having three employees and obligated by reason thereof to comply with the Act?

To Florida Industrial Commission:

Section 2 of the Workmen's Compensation Act provides that the term "employment" shall include all employments with certain exceptions, in which three or more employees are employed in the same business or establishment and every person carrying on such employment is defined to be an "employer."

Therefore it is my opinion that where a person employs three or more persons regularly in the same business or establishment the person carrying on such employment is an "employer" under the terms of the Act and is obligated to comply with the requirements thereof notwithstanding the fact that one or more of his employees may have rejected the provisions of said law.

WORKMEN'S COMPENSATION LAW

August 14, 1941.—041-522.

EMPLOYERS—WAIVER OF EXEMPTION—CANCELLATION

QUESTION: Where an employer who is not a liable employer as defined under Section 2 of the Workmen's Compensation Act, waives the exemption on his domestic employees as provided in Section 4 (b) of the Act, may such employer later withdraw or cancel such waiver of exemption? Will such employer be allowed to withdraw or cancel his waiver and return to his original status as an exempt employer, or must he continue subject to the Act, and if he does so continue and does not desire to secure the payment of compensation by qualifying as a self-insurer pursuant to Section 38 of the Act, or by procuring a standard Workmen's Compensation Insurance policy, does he thereby reject the provisions of the Act and in so doing waive his common law defense as provided by Section 6 of the Act?

To Florida Industrial Commission:

It is my opinion that an employer not originally a liable employer as defined under the Act, but who waives the exemption and accepts the provisions of said Act, then becomes a liable employer just as though he were originally liable, and may then elect not to accept the provisions of said Act as provided for in Section 5 thereof. This, of course, would necessitate a full compliance on his part with the requirements of Section 5 of said Act concerning the posting in a conspicuous place about his place of business of typewritten or printed notices of his non-acceptance of the provisions of the Act, as well as filing a duplicate of such notice with the Commission. Of course, no such non-acceptance is effective unless the required notice be given thirty days prior to any injury.

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November 20, 1941.—041-672.

EVERGLADES FIRE CONTROL DISTRICT—EMPLOYEES—
COVERAGE

QUESTION: Is it necessary for the Everglades Fire Control District to carry Workmen's Compensation Insurance?

To Mr. Guy J. Bender, Chief, Everglades Fire Control District:

Section 38 (a), Chapter 17481, Acts of 1935—Florida Workmen's Compensation Act—provides:

"Section 38. (a) Every employer shall secure the payment of compensation under this Act—

"(1) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association or exchange, authorized to do business in the State, or

"(2) By furnishing satisfactory proof to the Commission of his financial ability to pay such compensation and receiving an authorization from the Commission to pay such compensation directly. . . . Any employer securing compensation in accordance with the provisions of this paragraph shall be known as a self-insurer, and shall be classed as a carrier of his own insurance."

Section 2 (3), Chapter 17481, as amended by Section 1 of Chapter 20672, Laws of Florida, Acts of 1941, provides:

"(3) The term 'employer' means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustee of any person."

Section 38 (6e), Chapter 17481, provides:

"(e) The State, its Boards, Bureaus, Departments and Agencies and all its Political Subdivisions who employ labor shall be deemed self-insurers under the terms of this Act unless they elect to procure and maintain insurance to secure the benefits of this Act to their employees and they are hereby authorized to pay the premiums for the said insurance."

Based on the foregoing provisions, Everglades Fire Control District is authorized to purchase Workmen's Compensation Insurance to secure to its employees the benefits of the Workmen's Compensation Act, and to pay the premiums for said insurance from funds of the Everglades Fire Control District.

Everglades Fire Control District is not required under the foregoing provisions to purchase Workmen's Compensation Insurance; however, in the event it does not, then under Section 38 (6e) of Chapter 17481, the District will be deemed a self-insurer, as defined by Section 38 (a-2) of said Act, i.e., a carrier of its own insurance; and as such self-insurer, will be subject to the payment of the same benefits as provided for in said Act.

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October 22, 1941.—041-610.

**INDUSTRIAL COMMISSION—JURISDICTION OF CONTROVERSY
BETWEEN EMPLOYER AND INSURER**

QUESTION: Has the Commission jurisdiction to consider and determine a controversy between an employer and his insurance carrier, wherein the employer seeks to recover from the carrier expenses for medical attention furnished an injured employee by the employer and paid by the employer direct, when thereafter the carrier admitted liability and paid the employee compensation and discharged a portion of the medical bills?

To Florida Industrial Commission:

The primary purpose of our Workmen's Compensation Act is to insure to the injured employee and those dependent upon him adequate means of subsistence while he is unable to work, and also, by furnishing him with necessary medical attention, to bring about his recovery as soon as possible so that he may be returned to the rank of productive labor.

The Florida Industrial Commission is the administrative department of the State government charged with administering the Workmen's Compensation Act. Its duty is to make awards where justified and provide for their payment by those who are primarily or secondarily liable, and when the Commission has done this it is no concern of the Commissions how such liability may be shared by the employer and the carrier. The relation existing between the employer and the carrier is a contractual one whereby the carrier assumes the liability of the employer. There is a joint and several liability, and in my opinion the Commission is without jurisdiction to hear and determine a controversy between them as to how such liability shall be shared. Such a controversy is, in my opinion, one to be determined by courts of law and not by the Industrial Commission.

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January 13, 1942.—042-18.

**INDUSTRIAL SCHOOL FOR GIRLS—EMPLOYEE ENTITLED
TO COMPENSATION**

QUESTION: Was J. S. Beery covered by the Workmen's Compensation Act at the time he was injured while working at the Florida Industrial School for Girls?

*To Mrs. Lola C. Skipper, Superintendent, Florida Industrial
Schools for Girls:*

Mr. Beery was covered by the Workmen's Compensation Act at the time of the alleged injury.

This opinion is based upon the information furnished me by you to the effect that Mr. Beery was working under the supervision of Mr. Ivey Martin, making certain repairs at your institution during the recent repair program there. Mr. Martin, it seems, was appointed by the Board of Commissioners of State Institutions to act as foreman on the repair job, to select his own workmen, and to submit weekly payrolls to the Board. Said payrolls were paid out of the Institution's special emergency repair fund. Mr. Beery, it appears, was one of such workmen, and

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in my opinion was an employee of the State and therefore entitled to the benefits of the Workmen's Compensation Act.

WORKMEN'S COMPENSATION LAW

March 25, 1941.—041-166.

MEDICAL FEES—CHIROPRACTORS

QUESTION: (1) Where an employer under the provisions of Section 13 of the Workmen's Compensation Act selects a chiropractor to treat an injured employee, is the Chiropractor entitled to recover his fees for services rendered by award of the Commission?

(2) Where an injured employee, being dissatisfied with the medical services furnished by the employer, hires a chiropractor to treat him, is the chiropractor entitled to an award by the Commission for the amount of fees for the services rendered by him?

To Hon. Walter E. Rountree, Director, Workmen's Compensation Division, Florida Industrial Commission:

Section 13 of Florida's Workmen's Compensation Act, the same being Chapter 17481, Acts of 1935, as amended by Chapter 18413, Acts of 1937, is as follows:

"(a) The employer shall furnish such medical, surgical, and other attendance or remedial treatment under the direction and supervision of a qualified physician or surgeon, nurse and hospital service, medicine, crutches, artificial members, and apparatus for such period as the nature of the injury or the process of recovery may require. If the employer fails to provide the same after request by the injured employee, such injured employee may do so at the expense of the employer, the reasonableness and the necessity to be approved by the Commission. The employee shall not be entitled to recover any amount expended by him for such treatment or service, unless he shall have requested the employer to furnish the same and the employer shall have failed, refused or neglected to do so, or unless the nature of the injury required such treatment, nursing and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide the same; nor shall any claim for medical, surgical or other remedial treatment be valid and enforceable against the employer unless within twenty days following the treatment the physician giving such treatment furnish to the employer and to the Commission a report of such injury and treatment on a form prescribed by the Commission.

"(b) The Industrial Commission may at any time, for good cause shown it, in its discretion order a change in such medical remedial attention.

"(c) All fees and other charges for such treatment or services shall be limited to such charges as prevail in the same community for similar treatment of injured persons of like standard of living, and shall be subject to regulations by the Commission, who may adopt schedules of charges for such treatment or services, except that the total charge against the employer for such services and supplies shall not exceed the sum of \$250.00, except in surgical cases in which this maximum may be increased by order of the Commission not to exceed \$500.00.

"(d) If an injured employee objects within twenty-four (24) hours to the medical attendance furnished by the employer, it shall be the duty of the employer to select another physician to treat the injured em-

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ployee unless within the second twenty-four (24) hours the Commission determines that a change in medical attendance is not for the best interests of the injured employee. It shall be unlawful for any employer or representative of any insurance company or insurer to coerce or attempt to coerce a sick or injured employee in the selection of a physician or surgeon or other attendance or remedial treatment, nursing or hospital care, or any other service that the sick or injured employee may require; and any employer or representative of any insurance company or insurer who violates this provision shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than \$25.00 and not more than \$100.00 for each and every offense."

In answering your request for opinion, the question to be determined is what the Legislature meant by the words, "qualified physician or surgeon."

As originally passed in 1935, Section 13 (a) of the Workmen's Compensation Act, among other things, provided that: "the employer shall furnish medical, surgical and other attendance, or remedial treatment, nurses and hospital services, medicine, crutches and apparatus for such period as the need of the injury or process of recovery may require."

In construing the meaning of the foregoing provision of the 1935 law, this office rendered an opinion to the Florida Industrial Commission on January 26, 1937, to the effect that such provision contemplated and covered chiropractic treatment as well as other forms of medical or remedial treatment. We concur in that opinion.

After the amendment of 1937, when the foregoing provisions of Section 13 (a) were amended to require such treatment to be under the direction and supervision of a "qualified physician or surgeon," this office on September 14, 1937, rendered an opinion to your Commission to the effect that such provision was limited to such remedial treatment as is administered under the direction and supervision of a doctor of medicine, or surgeon, or an osteopathic physician or surgeon. We are unable to agree with that former opinion.

In his work on medical jurisprudence, Dr. Benton S. Oppenheimer, professor in the College of Medicine at the University of Cincinnati, in defining the terms "medicine", "physician" and "surgeon", said:

"In its commonly accepted meaning, *medicine* is that science or system of knowledge which has for its province the preservation of health, or the treatment of disease or bodily infirmity. It has to do with the study of the nature and causes of disease, and the methods of preventing, curing or alleviating it, as well as the treatment of bodily injuries. A *physician* is one who practices the art of healing disease or preserving health . . . and a *surgeon* is one who undertakes to cure disease or injuries by manual treatment or the use of mechanical instruments or appliances."

After giving a very exhaustive discourse on the subject of "Medicine" and the "Practice of Medicine", the Supreme Court of Alabama, in the case of *Bragg vs. State*, 32 So. 767, 770 said:

"While it is true, as we said above, there have always existed differences among physicians as to the therapeutic agencies that should be employed in the treatment of diseases, yet it has never been supposed that the disciples of any particular school of the healing art were "physicians,-practitioners of medicine,- and those of a different school or sect were not."

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In defining the term "physician", the Supreme Court of Illinois in the case of *People vs. Siman*, 115 N. E. 817, 818 said:

"A 'physician' is one versed in or practicing the art of medicine, and the term is not limited to the disciples of any particular school. The term 'medicine' is not limited to substances supposed to possess curative or remedial properties but has also the meaning of the healing art—the science of preserving health and treating disease for the purpose of cure—whether such treatment involves the use of medical substances or not—in common acceptation, anyone whose occupation is the treatment of diseases for the purpose of curing them is a physician."

In construing a statute regulating the practice of medicine, the Supreme Court of Wisconsin, in the case of *State vs. Schmidt*, 119 N. W. 647, 650, defining the term "physician", said:

"It is a waste of time, in our judgment, to view the term 'physician', from the standpoint of members of the profession belonging to the few great schools. It may be admitted that many, and perhaps most of them, think that no other healer should be known as a 'physician', or should be allowed to treat human ills for pay. It may be further admitted that judicial and other definitions of the term may be found quite in harmony with that view . . . neither need we go to the lexical definitions, where we would find a wide range, down to the simple definition, 'one who administers medicine to cure disease.' That medicine includes anything, however simple, 'administered in the treatment of disease,' and that disease includes any kind of disorder of the human system needs no support other than our common knowledge."

"Manifestly, the Legislature conceived that it was dealing with the entire class of persons known as physicians, in the broadest sense of the term, not in any narrow sense, which would favor those claiming, and perhaps entitled to superior distinction. The purpose was very far from that of creating a monopoly in favor of special schools of medicine. The term was evidently used in its proper sense, that of including any person of whatever school, and whether belonging to any known school, engaged in good faith, in treating human ills by any remedy, or remedies, however simple, so as to be known among the people as a physician."

Many courts have had occasion to define the term "chiropractic" and the following is illustrative of the general trend such definitions have taken:

"'Chiropractic' is a system of therapeutic treatment by manipulations, which aims to cure disease by mechanical restoration of displaced or subluxated bones, especially the vertebrae, to their normal relation, thus relieving pressure on nerves; consisting of examining patient's spine to determine which vertebra is displaced and reducing the dislocation by pressure with hands only, pushing or forcing vertebra back to its proper position or alignment."

Shober vs. Industrial Commission, 68 Pac. 2d, 756, 757, 92 Utah 399.

The statutes of our own State regulate the practice of Chiropractic and require that all applicants for license to practice this branch of the healing art shall pass an examination upon the following subjects:

Anatomy, Physiology, Chemistry, Bacteriology, Pathology, Hygiene, Chiropractic, Analysis, Orthopedics and Adjusting, as taught by recognized chiropractic schools and colleges. Section 3445, Perm. Supp. Vol. 3, C.G.L.

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Section 3446, Perm. Supp. Vol. 3, C.G.L. provides that any chiropractor who has complied with the provisions of this chapter may adjust three hundred or more articulations of the body and all structures adjacent thereto including the use of X-ray for diagnosis, but shall not prescribe or administer to any person any medicine or drug included in any materia medica, *perform any surgery except as hereinabove stated*, nor practice obstetrics.

In 1939 the Legislature enacted Chapter 19281, Laws of 1939, commonly known as the Florida Basic Science Law, wherein it is provided "For the purpose of this Act, the healing art includes any system, treatment, operation, diagnosis, prescription or practice for the ascertainment, cure, relief, palliation, adjustment or correction of any human disease, ailment, deformity, injury or unhealthy or abnormal physical or mental condition."

No distinction is made in the Basic Science Law between allopathic doctors, chiropractors, naturopaths, osteopaths, or others engaging in various branches of the healing art.

Our Supreme Court has had occasion to consider the practice of Chiropractic, and inferentially at least, has referred to those who practice that branch of the healing art as "physicians." We quote the following in that connection from the case of *Foster vs. Thornton*, 152 So. 667, 668:

"The science of chiropractic treatments is recognized as embracing a proper method for the treatment of many human ills and ailments. The chiropractic method of treatment of human beings for the cure of ills and ailments is recognized by the laws of the State of Florida, and those who practice that method of treating human beings are granted certificates and license to practice that method of treatment, *just as physicians of other schools who practice other methods of treatment are granted certificates and license to practice the treatment of ills and ailments according to the method of other schools.*"

Section 3458, C.G.L., in regulating the practice of chiropractic provides that "all licensed chiropractors shall observe and be subject to all State and municipal regulations relating to the control of contagious and infectious diseases, sign death certificates and comply with all laws pertaining to public health, reporting to the proper authority as other practitioners are required to do."

Section 3276, C.G.L. with reference to the medical certificate portion of the death certificate provides that it shall be signed by the *physician* last in attendance on the deceased, who shall specify the time in attendance, the time he last saw the deceased alive and the hour of the day at which the death occurred, and he shall further state the cause of death.

Sections 3302 to 3304, C.G.L. require all physicians to report contagious or infectious diseases to the State Board of Health, and Sections 7727 and 7728, C.G.L. provide penalties where licensed or practicing physicians fail to make such reports. The chiropractor comes within the provisions of those statutes just as physicians of other schools.

Now the primary purpose of the Workmen's Compensation Act is to insure to the injured employee and those dependent upon him, adequate means of subsistence while he is unable to work and also to bring about his recovery as soon as possible in order that he may be returned to the ranks of productive labor. By this means society as a whole is relieved of the burden of caring for the injured workman and his family and the burden is placed upon the industry. In order that the injured workman and his dependents may be cared for, compensation in the form

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of disability benefits is provided for by the Act, approximating the wages earned by the employee and varying with the degree of disability and dependence. And, to secure the speedy return of the workman to productive employment, it is provided that medical and surgical services shall be furnished by the employer. This liability for medical and surgical service is not, therefore, a burden placed upon the employer as a penalty for any failure of duty on his part but is merely a part of the whole compensation due the employee as a result of his injury. It, therefore, follows that the medical and surgical services contemplated and called for by the statute in question should be such as will tend to secure the return of the workman to productive employment. In other words, and perhaps more precisely stated, the treatment required by the statute is such as will reasonably and seasonably tend to relieve and cure the injured employee from the effects of the injury.

Each case, it seems to me, must be determined by its own facts. Undoubtedly, certain diseases or injuries are incapable of treatment by chiropractic methods just as there are many diseases and injuries which undoubtedly respond favorably to treatment by chiropractic methods. The statute, I think, requires both legal competency and competency in the particular case. Where the practitioner is licensed to practice the healing art by the lawful though limited methods of chiropractic and he is competent to treat the claimant in the particular case for the injury in question, then in my opinion he would be entitled to an award for such services performed by him.

The opinion from this office dated September 14, 1937, is based upon the decisions in the cases of *Corsten vs. State Industrial Commission* (Wisconsin) 240 N. W. 834 and *Chastney vs. State Board of Education* (N.J.) 145 Atl. 730. The *Corsten* case, *supra*, was one construing a Workmen's Compensation Act which limited the expense of treatment recoverable, to "medical, surgical and hospital treatment", while our statute allows "medical, surgical and other attendance or remedial treatment under the direction and supervision of a qualified physician or surgeon."

The *Chastney* case, *supra*, involved the question of whether or not a licensed osteopath could hold the position of "medical inspector" for a Board of Education.

I believe that the reasoning in the cases of *Shober vs. Industrial Commission* (Utah) 68 Pac. 2d, 756, and *Towers vs. Glider & Levin* (Conn.) 125 Atl. 366, is more nearly in accord with the purposes of our own Workmen's Compensation Act which, as I have said, seeks to bring about the injured workman's recovery as soon as possible in order that he may be returned to the ranks of productive labor, rather than create a monopoly in favor of any special school of medicine.

It is therefore, my opinion that a chiropractor is entitled to recover his fees by award of the Commission under such circumstances as you have set out in your request and any previous opinions from this office inconsistent herewith are hereby reversed.

WORKMEN'S COMPENSATION LAW

June 2, 1941.—041-313.

MEDICAL FEES—NATUROPATHIC PHYSICIANS

QUESTION: Are naturopathic physicians, licensed as such in the State of Florida, entitled to fees for medical services rendered under Section 13 of the Florida Workmen's Compensation Act?

LABOR—Workmen's Compensation Law*To Florida Industrial Commission:*

On March 25, 1941, this office rendered an opinion relating to the right of chiropractors to receive such fees. What we said in that opinion applies likewise to naturopathic physicians, licensed as such in the State of Florida.

Of course, each case must be determined by its own facts. It seems to me that there may be certain diseases or injuries incapable of treatment by naturapathic methods just as there are many diseases and injuries which undoubtedly respond favorably to treatment by naturopathic methods. The statute, I think, requires both legal competency and competency in the particular case where the practitioner is licensed to practice the healing art by the lawful, though limited, method of naturopathy, and if he is competent to treat the claimant in the particular case for the injury in question, then in my opinion he would be entitled to an award for such service performed by him.

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October 5, 1942.—042-480.

MEDICAL FEES—SCHEDULE

QUESTION: (1) Does the Florida Industrial Commission have the authority under Section 13, and particularly under Section 13 (c), as amended by the 1941 Legislature, to adopt a schedule of fees to be paid doctors rendering services to injured employees, which schedule would operate throughout the State of Florida, but subject to the exceptions as set forth in the recommendations submitted?

(2) Does the Florida Industrial Commission have the authority under Section 13, and particularly under Section 13 (c), as amended by the 1941 Legislature, to adopt a schedule of "minimum" fees to be paid doctors rendering services to injured employees, which schedule would operate throughout the State of Florida, but subject to the exceptions as set forth in the recommendations submitted?

To Florida Industrial Commission:

From your enclosures I note that the minimum fee schedule submitted was recommended to you by a committee composed of representatives of various interested groups, to-wit, doctors, employers and self-insurers, and insurance carriers. It further appears that only one member of the committee was recorded as not voting on the recommendation; otherwise it seems to have been unanimously approved by the committee members representing the various interested groups set out above.

Section 440.13 (3), Florida Statutes 1941, provides as follows:

"(3) All fees and other charges for such treatment or service shall be limited to such charges as prevail in the same community for similar treatment of injured persons of like standard of living, and shall be subject to regulations by the commission, who shall adopt schedules of charges for such treatment or services, except that the total charge against the employer for such services and supplies shall not exceed the sum of one thousand dollars."

Where liability to pay compensation under the Workmen's Compensation Act is controverted by the employer, the Commission is authorized and empowered to hold hearings, make investigations, and, where the facts warrant it, make awards for compensation and medical services.

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Where a controversy arises as to the proper fees for medical services, the Commission has the power to pass upon the reasonableness of such charges, keeping in mind the statutory provision that such fees shall be limited to the prevailing charges in the community where the treatment is given for similar treatment of injured persons of like standard of living, and make an award therefor, subject, of course, to review by the courts.

Under the quoted statute, it is mandatory upon the Commission, in my opinion, to adopt schedules of charges for medical services. The statute, however, is silent on whether or not such schedules shall contemplate maximum or minimum fees.

It is my opinion that the schedules of charges for medical services to be adopted by the Commission are nothing more nor less than schedules of charges which the Commission will approve in ordinary cases where there are no complicating circumstances which would justify a higher charge, or where there are no circumstances prevailing which would warrant a reduced fee or charge for such services.

In adopting these schedules of fees, the Commission, in my opinion, is merely saying to the interested parties that such fees will be approved by the Commission and adhered to unless satisfactory showing is made to warrant a different charge or fee. Such schedules are a mere guide which the interested parties may follow and know that such schedules will be adhered to by the Commission in controverted cases in the absence of satisfactory showing of extenuating circumstances.

It is therefore my opinion that the Commission has the authority to adopt the schedules of fees recommended, together with the exceptions set forth therein as submitted by you in your request.

It is further my opinion that such schedules cannot be considered either as maximum or minimum schedules of fees, but rather of charges to be followed and adhered to in ordinary cases, provided, of course, the fees set out in the schedules do not exceed the prevailing charges in the community where the treatment is given for similar treatment of persons of like standard of living, which provision is contemplated in the exceptions contained in the schedules submitted by you.

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August 19, 1941.—041-526.

MUNICIPALITIES—CLASSIFICATION OF GOVERNMENTAL AND PROPRIETARY ACTIVITIES

QUESTION: Of the various county and municipal activities listed herein, which are governmental and which are proprietary?

To Florida Industrial Commission:

In discussing governmental and proprietary functions and activities of municipalities, the Supreme Court of Florida in the case of Chardkoff Junk Company vs. City of Tampa, 135 So. 457, said:

"Governmental functions are those conferred or imposed upon the municipality as the local agency of limited and prescribed jurisdiction, to be employed in administering the affairs of the state, and promoting the public welfare generally. While in a certain sense any municipal function might be regarded as governmental, when properly applied the term 'governmental functions' should be limited to legal duties imposed

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by the state upon its creature, which it may not omit with impunity but must perform at its peril. Governmental functions are served by the police power of eminent domain; and also by those maintaining and operating a fire department, those furthering the administration of justice, and such other powers as are to be exercised by the corporation for the public weal, in or for the exercise of which the municipality receives no compensation or particular benefits . . . In respect of its purely business relations as distinguished from those that are governmental, a municipal corporation is held to the same standard of just dealing that the law prescribes for private individuals or corporations. Then the municipality acts for the private advantage of the inhabitants of the city and to a certain extent for the city itself. In such case it is not acting in its governmental capacity as sovereign, or in a legislative capacity, but is acting in a proprietary capacity, acting only in quasi-public capacity. It is performing a function not governmental, but often committed to private corporations or persons, with whom it may come into competition. The function may be municipal, but the method may not be. It leads to profit, which is the object of the private corporation."

In view of the foregoing distinction between governmental and proprietary activities, it is my opinion that of the specific activities mentioned in your letter the following are proprietary in nature:

- Airports
- Cemeteries
- City Docks
- City Golf Clubs
- Water Works
- Light Plants
- Radio Stations

It is likewise my opinion that the following are governmental in nature:

- Fire Departments
- Police Departments
- Parks
- Street Cleaning
- Sewerage Construction
- Planning Board

In the absence of more detailed information, it is my opinion that the following cannot be classified offhand either as governmental or proprietary:

Maintenance of Public Buildings—If the building is used for governmental purposes, then the maintenance of said building, in my opinion, would be a governmental activity. If, however, the building is used for proprietary activities, the maintenance thereof would be proprietary. For example, if the building houses the fire department, then the maintenance thereof would be a governmental function. If, on the other hand, the building is an office building and the municipality derives income in the way of rental for offices therein, the maintenance of said building would be proprietary.

Auto Garage Shops—If automobiles stored and repaired in such shops are used primarily for governmental purposes, then the operation and maintenance of said garage shops would be a governmental function. If, on the other hand, the automobiles stored and repaired in said shops are used primarily for proprietary purposes, or in connection with proprietary activities solely, then the operation and maintenance of said garage shops would be a proprietary activity.

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Clerical—Such employees who perform clerical work primarily in connection with the governmental functions of a municipality would be engaged in a governmental function. On the other hand, if their employment is in connection with proprietary functions, then they themselves would be engaged in a proprietary activity.

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October 14, 1941.—041-577.

MUNICIPALITIES—PRISONERS EMPLOYED—COVERAGE

QUESTION: Are prisoners employed by a city entitled to benefits provided for employees under this Act?

To Florida Industrial Commission:

Under the Workmen's Compensation Act, benefits are payable only to employees or dependents, and the term "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship.

So far as prisoners are concerned, there is no appointment or contract of hire or apprenticeship. A prisoner is engaged in involuntary servitude, and there is no duty upon the municipality to pay him wages, nor is he paid wages by reason of any contract of hire. The element of wages is entirely missing from the relationship existing between the municipality and the prisoner, and it is uniformly held that the right to demand pay for one's services is an essential to his right to receive benefits under Workmen's Compensation Acts.

It is therefore my opinion that prisoners working on city streets are not employees of the city and therefore are not entitled to the benefits provided for employees under our Workmen's Compensation Act.

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September 3, 1941.—041-546.

REAL ESTATE SALESMAN—INDEPENDENT CONTRACTOR

QUESTION: Under the circumstances set forth below, is the real estate salesman an independent contractor or an employee?

To Florida Industrial Commission:

The contract provides that the salesman shall use his best efforts in selling, leasing or renting any and all real estate listed with the broker, soliciting additional listings and customers, and otherwise promoting the business of serving the public in real estate transactions generally. The broker agrees to assist the salesman in his work by advice, instruction and full cooperation in every way possible. The only restriction on the manner in which the work of the salesman is to be done is that the salesman must conduct his business and regulate his habits so as to maintain and to increase rather than diminish the good will and reputation of the broker, and must conform to and abide by all laws, rules, regulations and codes of ethics that are binding upon or applicable to real estate salesmen. The salesman is to be paid by commission and the broker is not liable to the salesman for any expense incurred by him, nor is the salesman liable to the broker for office help or expense. The salesman has no authority to bind the broker by any promise or representation unless specifically authorized so to do in a particular transaction. All

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suits for commissions shall be maintained only in the name of the broker, and the salesman shall be construed to be a sub-agent only with respect to the clients and customers for whom services shall be performed, and shall otherwise be deemed to be an independent contractor and not a servant, employee, joint adventurer or partner of the broker. The contract can be terminated by either party at any time upon seven days' notice.

It is my opinion that under the contract referred to the real estate salesman is an independent contractor and the relationship of master and servant does not exist between such salesman and the broker. The salesman under the contract has the independent use of his own skill, judgment and means in the execution of the work and has the exclusive direction and control of the manner in which the work is to be done. From the majority of the cases on this question this seems to be the controlling factor in determining whether or not such a salesman is an independent contractor or an employee.

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September 17, 1942.—042-444.

**REFUNDING MONEYS PAID COMMISSION IN DEATH CASES
WHERE NO DEPENDENTS**

QUESTION: Workmen's Compensation Division of the Florida Industrial Commission has submitted voucher to the Comptroller for \$500 warrant to the Standard Accident Insurance Company. The voucher is intended to effect a refund to said insurance company in the amount of \$500 which was paid to the Commission on October 3, 1941, in the case of Jim Davis, deceased, vs. St. Joe Lumber & Export Company, under the assumption that the said Jim Davis left no dependents entitled to receive benefits under the Workmen's Compensation Act. Section 440.16 (2) (g), Florida Statutes 1941, provides that if the deceased employee leaves no dependents entitled to compensation under the Act, then \$500 shall be paid to the Florida Industrial Commission, which sum then becomes a part of the administrative fund of the Commission.

After the payment of the \$500 aforesaid by the Standard Accident Insurance Company to the Commission, it was developed at a hearing held by the Commission that the deceased employee did in fact have a dependent sister and two minor brothers.

May the Comptroller legally draw his warrant pursuant to said voucher?

To Hon. J. M. Lee, Comptroller:

The benefits of the Workmen's Compensation Act are intended for the employee and his dependents, and only in the absence of dependents is the Commission entitled to the payment of the \$500 prescribed in the above section of the Act.

The administrative fund of the Commission is not money or property of the State, and disbursements are made from it by the State Treasurer when approved by the Commission upon the order of the Comptroller. It is the duty of the Commission to determine questions of dependency and make awards to those entitled to the benefits of the Act, and in this particular case the Commission has determined that there are dependents of the deceased employee, and that the Commission is not entitled to retain the \$500 in question, but should refund it to the insurance company, and has approved such refund.

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It is therefore my opinion that you may legally draw your warrant in accordance with the Commission's requisition therefor, otherwise the dependents of the deceased employee might be deprived of the compensation to which they are entitled, and thus the purpose of the Workmen's Compensation Act would be defeated.

WORKMEN'S COMPENSATION LAW

August 2, 1941.—041-517.

SELF-INSURERS—BONDS—RETURN BEFORE EXPIRATION OF PERIOD FOR FILING CLAIMS

QUESTION: Should securities or an indemnity bond deposited by a self-insurer under the provisions of Section 38 (a) of the Florida Workmen's Compensation Act, be returned before the expiration of the statutory period for filing claims where the self-insurer ceases business?

To Florida Industrial Commission:

The indemnity bond and the securities referred to in Section 38 (a) of the Florida Workmen's Compensation Act are required to be deposited for the purpose of authorizing the Commission, in the event default is made in any compensation award, to sell the securities and make prompt payment of award. In the case of the indemnity bond the Commission is authorized to bring suit on the bond and thus secure the funds necessary for prompt payment of the award.

Inasmuch as a claim for compensation, under the Act, may be lawfully filed at any time within one year after the accident, securities deposited by a self-insurer should not, in my opinion, be returned until at least one year has transpired since the self-insurer ceased business, because it would be impossible at any time prior thereto for the Commission to know definitely that the self-insurer had not incurred some liability under the Act.

The form of indemnity bond prescribed by the Florida Industrial Commission, according to the copy thereof attached to your request, provides that the bond may be cancelled at any time by the surety upon giving thirty days' written notice to the Florida Industrial Commission, in which event the liability of the surety shall, at the expiration of said thirty days, cease and determine, except as to such liability of the principal on account of injuries or death to any of its employees as may have accrued prior to the expiration of the said thirty days, it being understood that the surety shall be liable within the penal sum mentioned in said bond for the default of the principal in fully discharging any liability on its part during the life of the obligation of said bond.

It is my opinion that no such surety bond should be returned within the one year period, even though the bond may have been cancelled by the surety, pursuant to the provision contained in the bond and hereinabove referred to because cancellation does not affect previously accrued liability. And, as we have said before, it would be impossible for the Commission to know definitely that the self-insurer had not incurred some liability, under the Act, until at least one year had transpired from the date the self-insurer ceased business.

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UNEMPLOYMENT COMPENSATION LAW

March 17, 1941.—041-160.

CONTRIBUTION RATE—EFFECTIVE DATE OF CHANGE

QUESTION: Does Section 8-D of the Florida Unemployment Compensation Law mean that no change in contribution rate in this State can become effective prior to January 1, 1945?

To Hon. B. A. Williams, Chairman, Florida Industrial Commission:

Section 8-C of the Florida Unemployment Compensation Law clearly indicates that the Legislative intent in making provision for an Experience Rating System was to "encourage and stimulate the maintenance of employment" and that such rating system should become effective January 1, 1942. This effective date clearly has reference to such Experience Rating System as may be adopted by the Legislature in 1941.

Section 8-D of the Act provides that if the Legislature should fail to adopt or make operative a system of merit rating as contemplated by Section 8-C of the Act, then and in that event, the merit rating system as provided for in Section 8-D should be followed by the Commission.

It appears to be the clear intent of the Act that a reduction in contribution rates should be possible for the calendar year beginning January 1, 1942. Section 8-D (2) provides that "No employer's rate for the calendar year beginning January 1, 1942, or for any calendar year thereafter, shall be less than 2.7 per cent *unless . . .*" etc. The very wording of this provision clearly indicates that the Legislature contemplated the possibility of a rate reduction for the calendar year 1942.

However, Section 8-D, in part, provides, "Each employer's rate shall be 2.7 per cent unless throughout the three years preceding the most recent computation date he was an employer subject to this Act and benefits were payable to any individual in his employ who became unemployed and eligible."

Contributions under this Act first became payable on or before January 31, 1938, as provided in Section 8-B of the Act. Therefore, there will be three years preceding the computation date of July 1, 1941, during which one may have been an employer subject to the Act.

However, benefits under the Act did not become payable until January 1, 1939, as provided in Section 4 of the Act.

Section 1602 (A) (1) of the Internal Revenue Code, as amended, provides:

"No reduced rate of contributions to a pooled fund or to a partially pooled account is permitted to a person or group of persons for an individual in his (or their) employ, except on the basis of his (or their) experience with respect to unemployment or other factors having a direct relation to unemployment risks during not less than three consecutive years immediately preceding the computation date . . ."

Thus the State of Florida, operating as it does under a pooled fund system, must have three years experience with factors directly relating to the risk of employment prior to the computation date before there can be a reduction in contribution rates. Florida's first computation date as set by the Act, is July 1, 1941.

There will be only two and a half years preceding Florida's first computation date of July 1, 1941, during which "benefits were payable

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to any individual in his (employers) employ who became unemployed and eligible." From this it necessarily follows that while the proposed Experience Rating System may become effective on January 1, 1942 still no reduction can be had thereunder in any contribution rate as of January 1, 1942, because there will be no prior three year period as prescribed by the Act.

It is my opinion that there can be, however, a reduction in the contribution rate of an employer in this State, *beginning January 1, 1943*, under the present wording of the Act if the following conditions are met:

(1) If the employer throughout the three years preceding the computation date of *July 1, 1942*, was an employer subject to the Act and benefits were payable to any individual in his employ who became unemployed and eligible; and

(2) If as of the computation date of July 1, 1942, the total of his contributions paid on his own behalf for any past periods exceeded the total benefits charged to his account for all such periods; and

(3) If the total assets of the fund as of the computation date of July 1, 1942, excluding contributions due but not then paid, exceeded the total benefits paid from the fund within the period of twelve consecutive months preceding July 1, 1942.

Now it may be that you have not been charging benefits to the account of individual employers. However, the records in your office will undoubtedly show all contributions made by liable employers since the date when contributions first became payable under the Act. You likewise no doubt have records in your office which, when analyzed, will show the amount of unemployment each liable employer has had during the time benefits have been payable under the Act, and for which benefits have been paid.

When the computation date of July 1, 1942, has arrived you will have one and one half years of contribution and benefit experience as reflected by the individual employer accounts. However, you must base the classification upon a three year period of experience. The necessary information for the remaining one and one half years of the prerequisite three year period, will be gleaned from an analysis of the present records kept in your office prior to January 1, 1941, which undoubtedly, as I have said before, discloses contributions made by liable employers as well as the amount of unemployment each liable employer had during said period and for which benefits have been paid, if any.

While the first half of the prescribed three year period will not be made up of "recorded experience", still during said period the employers have had "actual experience", which is, or should be, ascertainable from an analysis of your present records for said period of time as indicated above.

By way of a summary, it is my opinion that the Experience Rating System as contemplated by Section 8-B of the Florida Unemployment Compensation Law may become effective January 1, 1942, but that no reduction in contribution rates thereunder can be allowed for the year 1942.

It is further my opinion that reduced contribution rates can be allowed under such Experience Rating System beginning January 1, 1943, provided the three conditions hereinbefore enumerated are fully met.

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January 22, 1942.—042-40.

CONTRIBUTIONS—SUBJECTING HOMESTEADS TO PAYMENT

QUESTION: Can homesteads of Florida employers be sold to satisfy unemployment tax liens of the Florida Industrial Commission?

To Florida Industrial Commission:

Section 8 of the Unemployment Compensation Law requires each employer, for each calendar year in which he is subject to the Act, to pay contributions with respect to wages paid for employment occurring during such calendar year, and Section 15, subparagraph C of the Act, creates a lien in favor of the Commission, for such contributions upon *all the property, both real and personal, of the liable employer.*

The unemployment compensation laws of the various states are quite similar, if not identical, and the courts of last resort of a great many of the states have had occasion to pass upon the nature of these contributions, and have unanimously held that such contributions are "excise taxes."

The Unemployment Compensation Law provides that the lien for such contributions may be enforced by the Commission by issuing its warrant therefor directed to all and singular the sheriffs of the State of Florida, commanding them to levy upon and sell any real or personal property of the liable employer for the payment of the amount of said contributions, interest, costs, etc.

This method of enforcing such lien is the same as that provided in Section 32, Chapter 20956, Laws of Florida, 1941, with reference to the collection of license or privilege taxes. It is, too, the usual method prescribed for the collection of excise taxes in this state, and for the most part the lien for such excise taxes may be collected by resorting to any real or personal property belonging to the person liable for the tax.

Thus it seems clear that the Legislature intended that excise taxes, unemployment compensation contributions, license or privilege taxes, were to be collectible out of any property owned by the person responsible for the payment thereof.

However, Article IX, Section 7 of the Constitution, as amended, provides that:

"Every person who has the legal title or beneficial title in equity, to real property in this state and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars on the said home and contiguous real property as defined in Article X, Section 1 of the Constitution, for the year 1939 and thereafter."

And Article X, Section 1 of the Constitution, provides that homesteads as defined therein "shall be exempt from forced sale under process of any court."

Nevertheless, Article X, Section 1 of the Constitution, further provides that:

"No property shall be exempt from sale for taxes or assessments."

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Thus we find that homesteads to a certain valuation are exempt from taxation but are not exempt from sale for taxes, and in my opinion this is a clear implication that all property is liable for taxes, whether levied on that particular property or on some other property. This is in keeping with the general rule that exempting property from the burden of taxation does not have the effect of exempting and relieving it from liability for taxes due the sovereign.

A very thorough discussion of this principle of law was rendered by my predecessor, the Honorable George Couper Gibbs, in an opinion dated August 7, 1940, to the Beverage Department, in which opinion I fully concur.

It is therefore, my opinion that the homestead of a person liable for the payment of contributions to the Industrial Commission under the Unemployment Compensation Law, may be subjected to the lien of the Commission for such contributions and sold for the amount thereof.

In the opinion here given, I reserve any legal interpretation concerning the method prescribed by the statute for the collection of the contribution by the employer imposed under the Unemployment Compensation Law.

UNEMPLOYMENT COMPENSATION LAW

February 12, 1942.—042-90.

DISSOLVED CORPORATIONS—CLAIM FOR CONTRIBUTIONS

QUESTION: *Facts:* John Doe owned and controlled practically all of the stock of the "S" Corporation. The "S" Corporation was dissolved by proclamation of the Governor in September of 1936 but John Doe as President of the corporation continued to operate in a corporate capacity and upon the effective date of the Florida Unemployment Compensation Law made reports in the name of the corporation, which reports were signed by him as President. These reports were continuously filed in such manner until the "S" Corporation became financially involved and in a proceeding in the Circuit Court a receiver was appointed for the alleged corporation. The Receiver thereafter made contribution reports on behalf of the business done by the "S" Corporation.

Pending liquidation of the business in Receivership, John Doe died in May of 1941. The business was liquidated by sale for the sum of \$1,500.00 and the assumption on the part of the purchasers of certain stated obligations of the business—one of which was taxes generally. The account in the name of the "S" Corporation amounts to approximately \$1,100.00. No amounts were paid by the corporation or by John Doe individually or by the Receiver. Upon the discharge of the Receiver by order of the Circuit Court the \$1,500 received in liquidation was paid by the Receiver to the personal representative of the estate of John Doe.

Within 8 months of the first publication of notice to creditors in the estate of John Doe, claim was filed by the Commission for the amount of said taxes, in which claim it was alleged that the taxes were a personal obligation of the said John Doe, but if the Court should construe them to be an obligation of a de facto corporation then the Commission as a creditor of the corporation was entitled to the payment of these taxes before distribution of the corporate assets to the stockholders—in this case the estate of John Doe. To this claim the administrator filed objections asserting the Receivership, limitations and laches.

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No warrant was issued by the Commission on said account to the date of the filing of proof of claim.

(1) Is the obligation for the payment of the taxes the obligation of a de facto corporation, or is it the personal obligation of John Doe, subject to claim against the estate?

(2) Upon a patently frivolous objection being filed, does the County Judge have jurisdiction to overrule the same and order payment of a claim?

(3) Would the issuance of a tax warrant be considered as "proceedings" within the purview of the Probate Act?

(4) Does the Commission have a lien for contributions before the issuance and recording of warrant, subject to the acquisition of rights by third parties prior to the recording of the lien?

(5) If the Commission is deemed to have a lien subject to intervening third party rights before recording, is such lien exempt from the prohibition against levy upon the assets in the hands of the personal representative?

(6) Where the Probate Act makes no provisions for the payment of taxes in the order in which claims shall be allowed and paid, what is the priority of the Commission under Section 15 E of the law?

To Florida Industrial Commission:

(1) It is my opinion that this question is answered by my former opinion rendered to you under date of November 19, 1941, (041-656), when considered in the light of the explanatory part of your letter preceding the statement of questions presented for opinion. Thus, the unpaid contributions you refer to in your letter would, in my opinion, be a proper basis for claim on behalf of the Commission against the estate in question. The former opinion referred to, together with the decision of the Supreme Court in the case of Central Farmers Trust Company vs. Pinkham, 146 So. 563, I think supports this view. However, this opinion does not purport to pass upon whether or not the Commission has prejudiced its rights by reason of its failure to attempt a collection of the contributions pending the Receivership mentioned in your letter.

(2) The County Judge has no authority to adjudicate contested claims in probate.

(3) The issuance of a tax warrant under your statute is not such a "proceeding" as is contemplated by the Probate Act for proving contested claims. In my opinion an appropriate court action is the type of proceeding contemplated.

(4) Lien of the Commission for contributions is not effective until the warrant therefor has been issued and recorded as provided by the Act. In this connection, see Lovett vs. Lee, 193 So. 538.

(5) The lien of the Commission for contributions is not exempt from the prohibition against levy upon the assets in the hands of the personal representative. In my opinion, the liens so exempted are liens upon specific property.

(6) Your Act was passed by the Legislature after the enactment of the Probate Act, and the Legislature must be presumed to have had full knowledge of the provisions of the Probate Act at that time. There-

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fore, it is my opinion, construing the two Acts together, that irrespective of the provisions of the Probate Act, the Commission is entitled to have its claim for contributions paid in full prior to all other claims except claims for wages as provided in Section 15 E of your Act.

UNEMPLOYMENT COMPENSATION LAW

May 2, 1942.—042-216.

DISSOLVED CORPORATIONS—LIABILITY FOR CONTRIBUTIONS

QUESTION: John Doe Company, Inc., a Florida corporation was dissolved by proclamation of the Governor. John Doe was president and treasurer of the corporation but was not a director. His wife, Mrs. John Doe, was a director and the owner of 98% of the corporate stock. This company continued to operate as a corporation with no apparent change in its mode of operation.

(1) Under the above facts and circumstances, was John Doe an employee of the Board of Directors as trustees who are personally responsible for the payment of the tax, or was he an employee of his wife so as to bring his services within the exemption provided for in Section 3 E VII (e) of the Florida Unemployment Compensation Law, which provides as follows: "The term employment shall not include services performed by an individual in the employ of his son, daughter, or spouse, and services performed by a child under the age of 21 in the employ of his father or mother."

(2) Where two directors are practically inactive and hold only qualifying shares in the corporation, or no shares, do they become personally responsible for the payment of the tax or is this the sole responsibility of the owner of practically all the stock who is a director?

(3) Is there a resulting trust vesting title in the business in the stockholders so as to constitute them the employers solely responsible for the payment of the tax?

To Florida Industrial Commission:

(1) It is my opinion that John Doe was an employee of the Board of Directors acting as trustees of the dissolved corporation, and was not an employee of his wife so as to bring his services within the exemption provided for in the above quoted provision of the law. His wife in this instance is acting as a trustee and not as an individual.

(2) It is my opinion that it makes no difference how many shares of stock the directors hold in the corporation. A director holding one share is just as much a director as one who holds one hundred shares, and the legal responsibilities of the two, in my opinion, are the same.

(3) Having already said that the directors acting as trustees are responsible for the payment of the tax, I am of the opinion that the situation you refer to does not create a resulting trust vesting title in the business in the stockholders so as to constitute them the employers solely responsible for the payment of the tax.

UNEMPLOYMENT COMPENSATION LAW

November 19, 1941.—041-656.

DISSOLVED CORPORATIONS—TRUSTEES—LIABILITY FOR CONTRIBUTIONS

QUESTION: (1) Where a corporation has been dissolved by proclamation of the Governor for failure to pay its capital stock tax, but

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nevertheless has continued to operate as a corporation, irrespective of its dissolution and not merely for the purpose of winding up its affairs, against whom should the Florida Industrial Commission proceed to enforce liability for contributions incurred prior to the dissolution, subsequent to the dissolution and prior to and subsequent to the dissolution of the corporation?

(2) "A" corporation has never filed reports with the Secretary of State, but has held stockholders' meetings and elected other directors than those shown in the original charter. Which directors become trustees upon dissolution of the corporation—those set forth in the charter or last report, or those elected by the stockholders?

To Florida Industrial Commission:

(1) The corporation capital stock tax law of this state provides that corporations which have failed for a period of three years to file reports and/or pay the required capital stock tax, shall be classed as inactive and subject to be dissolved, and that the Secretary of State shall make up a list of all such corporations on the first day of January of each year, and shall give notice by publication that a proclamation dissolving or canceling the permit of such corporation will be issued three months after the date of such notice. The Secretary of State is required to prepare a list of such delinquent corporations contained in the published notices, and certify such list to the Governor, who shall issue a proclamation dissolving such delinquent corporations.

Where a corporation has been dissolved under the foregoing procedure, the directors thereof are by statute made trustees for any property that may be owned by such corporation, and they are required to handle and dispose of the same for the benefit of the stockholders, but the corporation as such, after being dissolved, has no further corporate rights and is not authorized to transact any business as a corporation.

Where a corporation, during its corporate existence and before its dissolution, has incurred obligations for contributions under the Florida Unemployment Compensation Law, the property of the corporation coming into the hands of the directors thereof as trustees, is in my opinion liable for such contributions, and the Industrial Commission may, for the purpose of enforcing such liability, proceed against the trustees in their representative capacity.

Where a corporation has been dissolved by proclamation of the Governor for failure to pay its capital stock tax, but continues thereafter to operate as a corporation, and after such dissolution incurs liability for contributions under the Unemployment Compensation Law, the directors of such corporation having upon its dissolution become trustees, such trustees are in my opinion personally liable for such contributions, because, the corporation being no longer existent, and without power of any kind, the obligation for contributions could only be incurred by said trustees through contracts for employment between such trustees and their employees. If the employment out of which grows the liability for contributions is for the purpose of settling the affairs of the corporation, then, in my opinion, the liability of the trustees for such contributions is limited to the assets of the former corporation in the hands of such trustees. If, on the other hand, the obligation for such contributions grows out of the acts of the trustees in continuing to transact and carry on business as a corporate entity, then, in such event, the liability of the trustees is a personal one and the Industrial Commission may proceed to enforce such liability against the trustees individually.

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Where a corporation incurs liability for contributions before its dissolution, and the trustees incur liability for contributions after its dissolution, then, in my opinion, the trustees are liable for the first contributions only to the extent of the assets of the corporation in their hands; whereas, with reference to the subsequent contributions, the trustees are personally liable, and, in a situation of this kind, the Industrial Commission, in my opinion, should bring separate proceedings against the trustees, one in their representative capacity for the former contributions, and one against them individually for the subsequent contributions.

(2) The directors last elected by the stockholders and holding office at the time of the dissolution of the corporation become the trustees for the purpose of winding up the affairs of the corporation.

In connection with the dissolution of corporations and the liability of trustees for such dissolved corporations, see *Trower vs. Stonebreaker-Zea Live Stock Company*, 17 Fed. Suppl. 687, and cases cited therein.

UNEMPLOYMENT COMPENSATION LAW

May 22, 1941.—041-268.

EMPLOYEES—ADMINISTRATIVE—ANNUAL LEAVE

QUESTION: What is the proper construction of Section 2 (b) of Regulation Number 43 of the Florida Industrial Commission, which reads as follows:

"(b) A permanent employee who has resigned, or who has been laid off or dismissed, shall be entitled to and shall receive all accrued leave computed on the same basis as permanent employees remaining in the service, except that an employee dismissed as provided by Section 2 of Article XIV of Regulation No. 6, amended, may, within the discretion of the Florida Industrial Commission, be denied all or any part of accrued leave."

To Florida Industrial Commission:

The clear intent of the Commission in adopting the foregoing regulation was to reserve to itself the discretion of denying all or any part of accrued leave with reference to a permanent employee who has been dismissed.

The power of the Commission to adopt and enforce regulations of this character is found in Section 12, paragraph D of Chapter 18402, Acts of 1937, as amended by Chapter 19637, Acts of 1939, Laws of Florida, known as the Florida Unemployment Compensation Law, which paragraph of said Section 12 provides, *inter alia*:

"The Commission shall establish and enforce fair and reasonable regulations for appointments, promotions and demotions, based upon rating of efficiency and fitness and for termination for cause."

The regulation in question is concerned exclusively with permanent employees who have resigned or who have been laid off or dismissed. The confusing part of the regulation is contained in the reservation of discretion. This portion refers to "an employee dismissed as provided by Section 2 of Article XIV of Regulations Number 6, amended."

Since there is no Section 2 of Article XIV of Regulation Number 6, amended, and since Article XIV of Regulation Number 6, amended, contains only the following:

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"The Commission shall adopt regulations covering attendance, vacation, sick leave, and other types of leave. Such regulations shall be uniformly applicable, insofar as possible, to the Commission."

It is apparent that the reference to Section 2 of Article XIV of Regulation Number 6, amended, is a mistake or typographical error.

Leaving out the reference to Section 2, Article XIV, the intent of the Commission remains clear and susceptible of immediate ascertainment. The regulations, as adopted by the Commission, appear to provide only one method for dismissing a permanent employee and that is found in Section 2, Article XII of Regulation Number 6, amended. The typographical error then appears to have been committed in writing Roman number fourteen for the Roman number twelve.

The Supreme Court of Florida has held that laws should be construed so as to give them effect and so as to carry out the intent. *State ex rel Cooper vs. Coleman*, 138 Fla. 520, 189 So. 691.

Our Supreme Court has also said that when legislative intention can be ascertained with reasonable certainty, words may be *altered* or *supplied* in statutes so as to give them effect and avoid repugnancy or inconsistency with intention. *Hayworth vs. Chapman*, 113 Fla. 591, 152 So. 663.

These general rules of construction would apply to rules and regulations of an administrative board in the same manner as they do apply to legislative enactments. Especially is this true when the Legislature has specifically authorized the administrative board to adopt rules and regulations.

In view of what has been said, it is my opinion that the Florida Industrial Commission may, under Section 2 (b) of Regulation No. 43, within its discretion, deny a permanent employee who has been dismissed, all or any part of accrued leave.

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March 24, 1942.—042-137.

EMPLOYEES—ADMINISTRATIVE—RESIDENCE REQUIREMENTS

QUESTION: Section 12 D of the Florida Unemployment Compensation Law provides in part as follows: "No person shall be employed by the Commission, nor shall the Commission authorize the payment of any compensation to any person employed under this act who has not been a resident of the State of Florida for at least five years immediately preceding his employment." In this connection can the word "resident", as so used, be construed to mean domicile, or does the use of such word require actual physical residence for the period prescribed?

To Florida Industrial Commission:

It is said that the term "resident" does not have a technical meaning. In some statutes, and for some purposes, it means one thing and in other statutes, and for other purposes, it means another thing. The apparent intent of the quoted provision of the Unemployment Compensation Law is to give preference to residents of the State of Florida. Under such circumstances it is generally held that a "resident of the state" is one who resides in the state; one who resides permanently or for a time in the state (in this instance, for a period of five years immediately preceding the employment). A resident may have a settled abode

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for a time, to be determined by circumstances. His residence may be temporary, for temporary purposes. He may retain his citizenship of one state and still be subject to the law of another state intended to protect the rights of residents of such state. However, "resident . . . for at least five years immediately preceding his employment", while meaning continuous residence for five years, is not synonymous with "immovability" nor does such term mean that the prospective employee must actually reside each day during the prescribed period in the state in order to be eligible for employment, since, to construe the statute so as to preclude a temporary departure from the state, by persons who actually live here, would impute a harsh and unconscionable intent to the Legislature.

"Domicile" is not the same as "residence", as the first expression indicates the fixed and permanent residence to which one, when absent, has the intention of returning. The other expression merely indicates the place of dwelling, whether permanent or temporary.

I call your attention to Section 1, Chapter 16183, Acts of 1933, which provides as follows:

"From and after the passage of this Act all persons employed to work for the State of Florida or for any county of the State, shall be bona fide residents of the State for two years next prior to such employment, *except only where after due diligence no person can be found in the State possessing the required qualifications necessary to the particular employment.*"

This quoted provision is similar in intent to the provision of the Unemployment Compensation Law now under discussion. The italicized portion of the above quotation indicates, it seems to me, that when the Legislature used the phrase, "bona fide resident of the state for two years next prior to such employment", it meant a resident actually living in the State of Florida and not one who maintains his domicile here but is a resident elsewhere.

Therefore, the word "resident", as used in the quoted portion of the Florida Unemployment Compensation Law, cannot be construed to mean "domicile" but means one who has actually lived in the State of Florida for the prescribed period of time, permitting of course, temporary absences from the state as indicated above.

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September 4, 1941.—041-500.

EMPLOYING UNIT—TERMINATION OF COVERAGE—TIME FOR MAKING APPLICATION

QUESTION: Is the provision contained in Section 9-B of the Florida Unemployment Compensation Law, as to the time an employing unit must file application for termination of coverage mandatory or merely directory?

To Florida Industrial Commission:

Section 9-B of the Florida Unemployment Compensation Law, being Chapter 18,402, Acts of 1937, as amended by Chapter 19,637 Acts of 1939, reads in part as follows:

"B. Except as otherwise provided in subsection C of this section, an employing unit shall cease to be an employer subject to this Act only

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as of the 1st day of January of any calendar year, only if it files with the Commission, prior to the 5th day of January of such year, a written application for termination of coverage . . ."

As an illustration, you give the following example:

"Employer 'A' submits an application for termination of coverage subsequent to January 5 of a calendar year. It is assumed that had the application been submitted prior to January 5 of such calendar year he would be entitled to termination of coverage as of January 1 of such year."

With respect to such employer, it is my opinion that the requirement is mandatory and that the Commission would have no authority to terminate the employer's coverage unless he had made proper application prior to January 5 or had previous to said date protested his liability and had thereafter, subsequent to January 5, filed formal application for such termination of coverage.

You likewise give the following example:

"Employer 'A' protests his liability for the payment of contributions prior to January 5 of a calendar year, but does not specifically request termination of coverage in writing; although correspondence from him indicates his desire to be relieved of liability. He presents formal written application for termination of coverage subsequent to January 5."

With respect to this employer, it is my opinion that his protest is sufficient to place the Commission on notice that said employer is no longer liable, and that the Commission may grant termination of coverage to this employer if he later files his formal application therefor.

You likewise inquire if under the amendment of 1941 an employer desires termination of coverage and requests same prior to January of a calendar year, may the Commission approve such termination effective as of January 1 next succeeding such request, or is the employer required to submit his application for termination of coverage during January of a calendar year in order to obtain approval of his application effective as of January 1 of such year.

Section 9-B of the Act as amended by Chapter 20,685, Acts of 1941, in part reads as follows:

"B. Except as otherwise provided in sub-section C of this section, an employing unit shall cease to be an employer subject to this Act only as of the 1st day of January of any calendar year, only if it files with the Commission, during January of such year, a written application for termination of coverage, . . ."

It will be noted that the primary difference between the requirement under the 1941 amendment and the requirement under the former Acts is that the application for termination of coverage under the former Acts must have been filed prior to the fifth day of January, whereas the 1941 Act provides that the application must be filed during January of such year.

It is my opinion that the Legislature intended to extend the time within which such applications might be filed, and did not intend to limit the time within which such applications could be filed to the month of January. In other words, it is my opinion that any such application for termination of coverage filed during January, or filed with the Commission prior to January, may properly be considered by the Commission as having been filed within the time required by the Act and granted or denied as the circumstances require.

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February 7, 1941.—041-32.

INDUSTRIAL COMMISSION—APPOINTMENT OF PERSONS TO SIGN REQUISITIONS ON UNITED STATES TREASURY

QUESTION: Regulation No. 45 adopted November 13, 1940, by the Florida Industrial Commission authorized Parks Glover and Fred B. Bradshaw to sign requisitions withdrawing funds from the State of Florida trust fund in the United States Treasury. Is the aforesaid authorization in accordance with the unemployment compensation law and other laws of the State of Florida?

To Florida Industrial Commission:

The records in the office of Secretary of State of Florida show that Mr. Parks Glover was duly appointed as the Chairman of the Florida Industrial Commission on November 8, 1940, and commissioned on November 12, 1940. His authority as Chairman of said Commission began on the date of his commission.

The records in the office of the Secretary of State likewise show that Mr. Parks Glover tendered his resignation on January 10, 1941, as Chairman of said Commission and that his resignation was duly accepted on January 30, 1941, by the Honorable Spessard L. Holland, Governor.

It is my opinion that Mr. Parks Glover was the duly appointed, qualified and commissioned Chairman of the Florida Industrial Commission between the dates November 12, 1940, and January 30, 1941, and that his appointment as such fully met the requirements of Florida law.

Section 10 C, Chapter 18402, Laws of Florida, Acts of 1937 (Unemployment Compensation Act), as amended by Section 6, Chapter 19637, Laws of Florida, Acts of 1939, reads in part as follows:

"Monies shall be requisitioned from this State's account in the unemployment trust fund solely for the payment of benefits and in accordance with *regulations* prescribed by the Commission. The Commission, through the Treasurer, shall from time to time requisition from the unemployment trust fund such amounts not exceeding the amounts standing to this State's account therein, as it deems necessary for the payment of benefits for a reasonable future period."

Section 12 B of the same Act reads in part as follows:

"Regulations may be adopted, amended or rescinded by the Commission and shall become effective in the manner and at the time prescribed by the Commission."

From the above quoted provisions of the Act it appears that a regulation is the proper method by which the Commission may delegate its power to requisition funds.

Regulation No. 33 of the Florida Industrial Commission referred to by you in your communication to me dated January 21, authorized Harold C. Wall and Fred B. Bradshaw to sign such requisitions withdrawing funds from the State of Florida trust fund in the United States Treasury.

It is my opinion that regulation No. 33 was duly rescinded by the adoption of regulation No. 45 and that Mr. Parks Glover and Mr. Fred B. Bradshaw were, from November 13, 1940, to and including January 30, 1941, legally authorized to sign requisitions drawn on the Secretary of the Treasury of the United States for such amounts not exceeding the

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amount standing to this State's account therein, as the Commission deemed necessary from time to time during said period for the payment of benefits for reasonable future period and that the Secretary of the United States Treasury should honor such requisitions when signed by either Mr. Parks Glover or Mr. Fred B. Bradshaw between the dates November 13, 1940, and January 30, 1941.

UNEMPLOYMENT COMPENSATION LAW

October 17, 1942.—042-498.

**INDUSTRIAL COMMISSION—ESTOPPED TO COLLECT TAXES
UNDER CERTAIN CIRCUMSTANCES**

QUESTION: An insurance company, operating and doing business in the State of Florida, on August 27, 1937, informed the Industrial Commission in a letter directed to the Chairman that it intended to claim exemption under Section 3-E-VI (e) of the Florida Unemployment Compensation Law.

"On September 1, 1937, the Director of Unemployment Compensation Division, in a letter addressed to the Insurance company, informed it that membership in a Federal Home Loan Bank exempts an insurance company under Section 3-E-VI (e) of the Florida Unemployment Compensation Law and evidence of such membership was requested.

"Evidence of such membership as of August 9, 1937, was presented to the satisfaction of the Commission and under date of October 7, 1937, the insurance company was informed that it would be held responsible for the taxes for periods up to the date of its membership in the Federal Home Loan Bank, but would thereafter be exempt. Under date of January 3, 1938, return was made by said insurance company together with payment of taxes due, with the statement that it was a final return. No demand was subsequently made of such company for the payment of any contributions which may have been due upon the basis that the ruling made was clearly erroneous.

"Subsequently a claim was filed on January 16, 1941, by a former salesman and collector of this insurance company for benefits based upon wages earned by him during the period in which the company was, by administrative ruling, held exempt because of its membership in the Federal Home Loan Bank. The Appeals Referee in deciding the issues held that the ruling was erroneous and that the claimant had earned wages in covered employment.

"... This decision of the Appeals Referee was upheld by the Board of Review and the matter was by the insurance company appealed to the Circuit Court. The decision of the Board of Review was by the Circuit Court reversed upon several grounds ...

"The judgment of the Circuit Court is not before the Supreme Court on appeal ..."

In connection with the foregoing facts;

In the event the Supreme Court should hold that the Claimant is entitled to the benefits of the law notwithstanding the erroneous ruling of the Commission under the circumstances stated above, would the Florida Industrial Commission have estopped itself from collecting the taxes retroactively?

LABOR—Unemployment Compensation Law**To Florida Industrial Commission:**

The 1941 Session of the Legislature amended the Unemployment Compensation Law by enacting Chapter 20685. Section 3-E-VI (e) of the old law, to which you referred, has been eliminated. However, Section 3-E-VII (n) has been included in the new law and provides as follows:

"VII. The term 'employment' shall include—

(n) Service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission."

Thus the Legislature by said amendment recognized and approved the construction of said Unemployment Compensation Law by the Commission in exempting such insurance companies from the provisions of said law.

In the case of *Landis vs. W.O.W.*, 131 Fla. 867, 180 So. 33, the Supreme Court of Florida said:

"There has in times past existed some confusion in the law as to whether or not the doctrine of estoppel could be raised against the state, but as to the facts shown here, there seems no doubt that it may be done."

Therefore, in view of the facts set out in your request, the legislative amendment of 1941 above referred to, and the fact that estoppel may be raised against the State in certain instances, it is my opinion that the Commission in the present case is estopped from collecting the taxes mentioned in your letter retroactively from said insurance company, at least where the employees are paid on a commission basis.

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June 2, 1941.—041-302.

LEGISLATIVE ADOPTION OF FUTURE ADMINISTRATIVE INTERPRETATION

QUESTION: What is the proper construction of Section 3-E-VI (i) ?

To Mr. Patrick H. Mears, Appeals Referee, Unemployment Compensation Division, Florida Industrial Commission:

The Section referred to is as follows:

"Provided, that in the event any employer, or employment is excluded from the operation of Title IX of the Federal Social Security Act, or amendments thereto, or any Federal Statute, or any ruling of Federal Social Security Board, then such employer or employment shall be, by virtue of such fact, excluded from the operation of this Act."

The immediate question appears to be whether or not the above quotation of our statute contemplated as a part thereof a subsequent enactment of Federal Congress, effective January 1, 1940, to the effect that the term "employment" as used in subsection (o), Chapter 9 of the Internal Revenue Code should not include "service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission."

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It appears that there is no objection in a constitutional sense to the enactment of a State law embodying in the same words any test, standard, definition or rule prescribed by Federal law or adopted under its authority. In re Opinion of the Justices, 239 Mass. 606, 133 N. E. 453.

However, under a Constitution in which the legislative power is vested, as in the Constitution of Florida, in a Legislature composed of a House of Representatives and a Senate, where each operates as a check on the other, it would be an unlawful delegation of legislative power and an abdication by the Representatives of the people of their power, privilege and duty to enact laws, if such a Legislature should attempt to incorporate, by reference, into its own enactments future enactments of Congress establishing a rule, test or definition of "employment", or some other situation upon which the State Legislature was visiting its legislative attention.

Your present situation here is almost identical with that set forth in the Maine case of *State vs. Intoxicating Liquors*, 117 Atl. 588. In that case the Court was considering a State statute which attempted to incorporate therein any definition of the term "intoxicating liquors" based upon the presence of a specified percentage of alcohol, then or thereafter declared by Congressional enactment, or by decision of the Supreme Court of the United States. The Maine Court held in that case that since the State statute was adopted January 8, 1919, and the Congress of the United States subsequently thereto, on October 28, 1919, enacted legislation defining intoxicating liquors, the subsequent Congressional enactment did not become a part of the State statutes enacted prior thereto because to so hold would be to recognize and uphold an unlawful delegation of the law-making power.

Our own Court has held on many occasions that the Legislature may not delegate the power to enact a law or to declare what the law shall be, or to exercise an unrestricted discretion in applying the law. *Bailey vs. Van Pelt*, 78 Fla. 537, 82 So. 789, *State vs. Fowler*, 94 Fla. 252, 114 So. 435, *Richardson vs. Baldwin*, 124 Fla. 233, 168 So. 255.

To construe Section 3-E-VI (i) of the Unemployment Compensation Law so as to include therein the subsequent enactments of the National Congress would result in holding it unconstitutional because of unlawful delegation of the law-making power.

However, it is a rule of construction that a statute should be so construed and applied as to make it valid and effective if the language does not exclude such an interpretation. *State vs. Duval County*, 76 Fla. 190, 79 So. 692, *State vs. Johns*, 92 Fla. 187, 109 So. 228.

It is my opinion that Section 3-E-VI (i), supra, can be so construed as to make it valid and effective.

It is my further opinion that this Section can be and should be so construed as to exclude therefrom only employments or services not included within the operation of Title IX of the Federal Social Security Act, or amendments thereto which were in effect as of June 12, 1939, the date the Florida Unemployment Compensation Law was amended by the Legislature to contain section 3-E-VI (i) in its present form.

UNEMPLOYMENT COMPENSATION LAW

September 9, 1941.—041-510.

**PROSECUTIONS—FALSE STATEMENTS—EVIDENCE AND
PROCEDURE**

QUESTION: Section 18 of the Florida Unemployment Compensation Act as amended provides as follows:

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"PENALTIES. A. Whoever makes a false statement or representation, knowing it to be false, or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under this Act, either for himself or for any other person, shall be punished by a fine of not less than \$50.00 nor more than \$100 or by imprisonment for not longer than thirty days, or by both such fine and imprisonment."

The procedure heretofore set up for the enforcement of the foregoing section is to make affidavit showing false statements on the part of the claimant of earnings during the periods for which he claims benefits and showing further the receipt of benefit checks in the illegal amounts. It has been the practice to submit in evidence photostatic copies of State warrants showing the receipt of moneys by the claimant under prosecution. Is the introduction of photostatic copies of such State warrants an unnecessary step in such prosecution in view of the fact that the crime defined in said section is solely the making of false representations or failure to disclose a material fact rather than the receipt of money pursuant thereto?

To Florida Industrial Commission:

It is my opinion that the making of the false statement, or the failure to disclose a material fact with knowledge thereof, is in fact the crime defined by the foregoing section, and since this is so, the fact that the claimant received money pursuant thereto would probably be immaterial insofar as prosecution under said section is concerned. However, it is my opinion that the introduction of photostatic copies of State warrants received and cashed by the claimant pursuant to the false statements for which he is being prosecuted, constitutes very damaging evidence concerning the claimant's intent. In view of the fact that every man is presumed to intend the natural consequences of his acts, when he is confronted with photostatic copies of State warrants showing the receipt of moneys pursuant to the false statements for which he is being prosecuted, it becomes very difficult for him then to deny his intent in the matter. Therefore, while the introduction of these photostatic copies may be unnecessary, nevertheless they appear to me to be advisable and of considerable advantage in the successful prosecution of such cases.

UNEMPLOYMENT COMPENSATION LAW

November 21, 1941.—041-673.

PROSECUTIONS—INDICTMENTS AND INFORMATION—TRIAL

QUESTION: (1) The representation as to each week's earnings of the party filing a claim for benefits constitutes a single act and each fraudulent representation is a distinct offense. Is it legally possible for the prosecuting attorney to incorporate in one information multiple counts each charging a separate offense under Section 18 of the Unemployment Compensation Law?

(2) In the trial of the case, the evidence of the representation is admissible because the county solicitor has as witness the employee of the Florida Industrial Commission to whom the representation was made and the signed statement of the claimant indorsed by the employee of the Commission showing the periods covered and the represented earnings. In order to prove this false, it is incumbent on the prosecuting attorney to prove the true earnings of the defendant for that particular period. These defendants are not regularly employed and are paid on a daily or hourly basis. The time they spend in employment is reported by the timekeeper and the pay master pays off accordingly.

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The report of the timekeeper and the paymaster is thereupon submitted to the bookkeeper who enters the amounts paid in the permanent records of the employer. Because of the expiration of time in the discovery of these frauds, it is at times impractical and at times impossible to locate the timekeeper or the paymaster, and the proof must depend solely upon the permanent records kept by the employer. The law and the rules and regulations of the Commission require that these records be kept. The question to be determined is whether or not these records are hearsay evidence and if so are they admissible as an exception to the hearsay rule?

To Florida Industrial Commission:

(1) Section 18 of the Unemployment Compensation Act provides as follows:

"Section 18. PENALTIES. A. Whoever makes a false statement or representation, knowing it to be false, or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under this Act, either for himself or for any other person, shall be punished by a fine of not less than \$50.00 nor more than \$100 or by imprisonment for not longer than thirty days, or by both such fine and imprisonment."

Section 7105, Compiled General Laws of Florida, in defining felonies and misdemeanors, is as follows:

"Any crime punishable by death, or imprisonment in the State prison, is a felony, and no other crime shall be so considered. Every other offense is a misdemeanor."

Section 7103, Compiled General Laws of Florida, with reference to punishment of misdemeanors, provides that:

"Whenever punishment by imprisonment is prescribed, and the said imprisonment is not expressly directed to be in the State prison, it shall be taken and held to be imprisonment in the county jail, . . ."

The offense described in Section 18 of the Unemployment Compensation Law is, therefore, a statutory misdemeanor.

Section 7126, Compiled General Laws, provides that:

"The common law in England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject."

Our criminal code contains no specific provision prohibiting the joinder of several distinct offenses by different counts in an indictment or information, and at common law several distinct offenses, where they are misdemeanors in grade, may be thus joined by different counts in the same indictment or information if they are of the same nature and require similar punishment, and the state will not be compelled to elect between them but may have a judgment upon the counts supported by the evidence. In the absence of statute or decision of our Supreme Court to the contrary, it is my opinion that this rule is applicable in this state.

Applying the above common law rule to your first question, it is my opinion that different false representations condemned by Section 18 of the Unemployment Compensation Law may be made the subject,

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as distinct offenses, of different counts of the same indictment or information.

(2) Where book entries are made up from temporary memoranda and constitute the first complete and permanent records of the business, they are admissible in evidence when verified by the oath of the person making the entry that they are correct and were made at or near the time of the transaction. If such transactions are regularly reported to the bookkeeper, and from such reports the entry is correctly and contemporaneously made by such bookkeeper, they may be received in evidence, in my opinion, when duly verified by him.

Section 4410, Compiled General Laws, provides for the admissibility in evidence of books of account, and the foregoing discussion appears to be in accord with the decisions of our Supreme Court construing that statute.

It is, therefore, my opinion that the permanent records of the employer are admissible in evidence to show the wages received by the accused with respect to which the false representations are alleged to have been made.

UNEMPLOYMENT COMPENSATION LAW

August 20, 1942.—042-408.

WARRANT PROCEEDINGS—THIRD PARTY CLAIMS

QUESTION: In a warrant proceeding by the Florida Industrial Commission, under Section 15-C of the Unemployment Compensation Law (Section 443.15, Florida Statutes 1941), a third party claimant filed affidavit and bond with the sheriff as provided in Section 55.39, Florida Statutes 1941, whereupon the sheriff released to said third party claimant the property upon which he had levied under your warrant. Inasmuch as Section 55.40, Florida Statutes 1941, in such third party claim proceedings requires the sheriff, upon the filing of said affidavit and bond, to desist from the levy and return the execution to the Court from whence it issued, wherein at the next term of said court a jury shall be sworn to try the right of property; and inasmuch as the sheriff in this particular instance was making his levy under a tax warrant of the Industrial Commission rather than under an execution issued by some court, what court shall try the right of property?

To Mr. Burnis T. Coleman, General Counsel, Unemployment Compensation Division, Florida Industrial Commission, Tallahassee, Fla.:

A third party claim statute is in derogation of the common law, and must be strictly followed in cases where it is applicable. It requires the claimant to make oath that the property levied on belongs to him, and to give bond with security. It also makes it the duty of the sheriff to return the execution to the next term of the court whence it issued, together with the affidavit and bond, whereupon a jury at the next term of said court shall try the right of property.

The return of the execution, affidavit and bond is necessary to give the court jurisdiction in such cases (*Betton vs. Willis*, 1 Fla. 230).

In the present case, the sheriff was not making a levy pursuant to an execution issued by a court; he was proceeding under a warrant issued by the Industrial Commission in a statutory proceeding for the collection of unemployment contributions, and only a copy of the warrant is

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required to be filed in the office of the Clerk of the Circuit Court. Neither the Circuit Court nor the Clerk thereof has any affirmative acts to perform in order to lend efficacy to such warrant or the levy made pursuant thereto. Filing a copy thereof with the Clerk is merely for the purpose of establishing record notice for the information and guidance of subsequent lienors. It is true that your statute says that the sheriff, after recording a copy with the Clerk, shall proceed upon the warrant in all respects with like effect and in the same manner prescribed by law in respect to executions issued against property upon judgments of a Circuit Court, but this does not have the effect of making the Commission's warrant an execution of the Circuit Court. It merely establishes the method of procedure to be followed by the sheriff in its executions (See *Bucky vs. Willard*, 16 Fla. 330).

The statutory claim proceedings permitted a stranger whose property is levied on are not exclusive but merely cumulative. In cases where the statutory remedy for third party claimants is inapplicable, the claimant is necessarily remitted to such other remedies as the law affords.

It is, therefore, my opinion that the statutory third party claim proceeding is inapplicable in the present instance and cannot be used as a remedy for trying the right of property in a warrant proceeding by the Commission, and, being inapplicable, the sheriff was without authority to release the property levied upon under your warrant. The sheriff, therefore, should recover the property from the claimant and proceed to satisfy your warrant, leaving the claimant to pursue such other remedy as the law affords.

CHILD LABOR

July 15, 1942.—042-353.

BOARD OF FORESTRY AND PARKS—EMPLOYMENT OF MINORS

QUESTION: Where the Florida Board of Forestry and Parks is unable to procure the necessary employees for forest fire prevention and suppression, who are eighteen years of age or more, may it employ minors for such purpose who are under eighteen years of age?

To Hon. H. J. Malsberger, State Forester:

Under our Child Labor Law (chapter 20,955, acts of 1941), except in certain designated employments not here material, no minor *under sixteen years of age* may be employed in any gainful occupation during that period of time such minor's school is in session, and, as a condition precedent to employment when such school is not in session, the employer is required to obtain, from the county superintendent of schools of the county where the minor resides, an employment certificate as to each minor. Minors under ten years of age may not be employed. When minors under sixteen years of age are employed they must not be worked more than eight hours in any one day or more than forty hours in any one week. Minors under sixteen years of age must not be worked before 6:30 o'clock in the morning or after 8:00 o'clock in the evening.

No minor *under eighteen years of age* may be employed in certain designated hazardous occupations (enumerated in Section 12 of chapter 20,955, acts of 1941), which includes the operation of motor vehicles and the working as a helper thereon, or any other employment hazardous or injurious to the life, health, safety or welfare of such minor. The State Labor Inspector is empowered and authorized to determine

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what employments, other than those designated by the statutes, are hazardous or injurious to minors. Where minors sixteen or seventeen years of age are employed they must not be worked before 6:00 o'clock in the morning or after 10:00 o'clock in the evening, or more than five hours without an interval of at least thirty minutes, which must be a continuous interval.

I am of the opinion that the above mentioned provision relating to the operation of motor vehicles and the helper thereon does not apply to employees who are transported by motor vehicle but have nothing to do with the operation of that vehicle. It is my understanding that employees of your board, who are engaged in fire prevention and suppression and who are under eighteen years of age, have nothing to do with the operation of the motor vehicle in which they are transported to and from forest fires.

Although the work of preventing and suppressing forest fires does not affirmatively appear to be a hazardous or injurious occupation, under the statute, such fact would seem to be for ultimate determination by the State Labor Inspector. From a practical standpoint, if the Board finds it necessary to employ minors under eighteen years of age, the labor inspector should be requested to determine whether or not the work to be performed by the minors is a hazardous or injurious occupation and, if it is found not to be, such minors should be employed and worked under the limitations pointed out aforesaid.

CHILD LABOR

December 20, 1941.—041-695.

EMPLOYMENT CERTIFICATES—SCHOOL CHILDREN

QUESTION: May employment certificates be issued for children fourteen or fifteen years of age who are to be excused from school, except when a child is to be employed in domestic or farm work in connection with his own home and directly for his parent under the conditions prescribed in Section 607 of the School Code and Section 2 of the Revised Child Labor Act?

To Hon. Colin English, State Superintendent of Public Instruction:

To Hon. T. H. Hutchinson, State Labor Inspector:

Section 607 of the Florida School Code authorizes the county superintendent to issue on his own initiative, or on the recommendation of the principal or trustees concerned, employment certificates to children fourteen or fifteen years of age and specifies the conditions upon which such certificates may be issued.

The Florida Child Labor Law, as amended by Chapter 20955, Laws of Florida, 1941, does not permit employment of children fourteen or fifteen years of age during school hours, except in domestic or farm work in connection with his parent. Such children may, however, be engaged in employment as an integral part of a regular course of vocational training.

In my opinion, the provisions of the Child Labor Law, as amended, are controlling in this situation, and, therefore, employment certificates may not be issued for children fourteen or fifteen years of age who are to be excused from school unless such child is to be employed in domestic or farm work in connection with his home and directly for his parent.

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May 12, 1942.—042-236.

MARRIAGE—OPERATION OF LAW NOT AFFECTED

QUESTION: Does the marriage of a minor remove the penal provisions provided for in Chapter 20955, Acts of 1941; that is, may persons employ minors who are or have been married without being subject to the penal provisions contained in said Act?

*To Hon. H. Gunter Stephenson, County Solicitor,
Criminal Court of Record, Bartow, Florida:*

The Child Labor Law was enacted for the primary purpose of promoting the welfare and protecting the morals of children. In the furtherance of this purpose, the employment in designated places of business of minors who have not attained a certain age is specifically prohibited. The Child Labor Law does not exempt from its operation the employment of those minors who are married but have not attained the age designated in said law.

It is my opinion that one may not lawfully employ a minor who has not attained the age designated in the applicable section of the Child Labor Law, even though such minor may be, or may have been, married.

CHILD LABOR

July 29, 1941.—041-411.

MILK TRUCK DRIVERS' HELPERS—EMPLOYMENT UNDER SIXTEEN YEARS OF AGE

QUESTION: Does the employment of milk truck drivers' helpers under the age of sixteen violate the child labor laws as contemplated by Section 18, Chapter 18413, Acts of 1937? Also, would it make any difference if these helpers were employed by the drivers themselves rather than by the dairy which operates the milk truck?

*To Hon. Walter E. Rountree, Director, Workmen's Compensation
Division, Florida Industrial Commission:*

I call your attention to Section 12 of Chapter 20955, Laws of Florida, Acts of 1941, which provides as follows:

"Whoever violates any provisions of this Act, or employs or permits or suffers any minor to be employed or to work in violation of this Act, or of any order issued under the provisions of this Act, or obstructs persons authorized under this Act in the inspection of places of employment, and whoever, having under his control any minor, permits him to be employed or to work in violation of this Act, shall for such offense be guilty of a misdemeanor, and upon conviction, be subject to a fine of not exceeding \$500.00 or imprisonment in the County jail with or without hard labor not exceeding six months or by both such fine and imprisonment, at the discretion of the court. Each day during which any violation of this Act continues shall constitute a separate and distinct offense, and the employment of any minor in violation of the Act shall, with respect to each minor so employed, constitute a separate and distinct offense."

I also call your attention to Section 14 of the same Act which provides, in part, as follows:

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"No minor under 18 years of age shall be employed, permitted or suffered to work in the operation of a motor vehicle or as a helper thereon;"

In view of the cited provisions of the Florida Child Labor Laws, it is my opinion that the employment of milk truck drivers' helpers, under the age of 16 years is in violation of such Child Labor Laws and such employment would invoke the provisions of Section 18, Chapter 18413, Laws of Florida, Acts of 1937, *supra*, whether such employment was by the dairy or by the drivers of said milk trucks.

December 12, 1942.—042-559.

To Florida Industrial Commission:

In view of my above opinion to you, dated July 29, 1941 (041-411), relating to employment of milk truck drivers' helpers under the age of sixteen years, and my opinion to Florida Board of Forestry and Parks, dated July 15, 1942 (042-353), and what may seem on the face of these two opinions to be an inconsistency regarding the minor involved in the Forestry's opinion under eighteen and over sixteen and the minor involved in the opinion to your Commission on milk trucks under sixteen, am calling your attention to the Forestry's opinion in which I have held as to minors between the ages of sixteen and eighteen that the statute which provides: "No minor under eighteen years of age shall be employed, permitted or suffered to work; in the operation of a motor vehicle or as a helper thereon" does not apply to a minor between the years of sixteen and eighteen working on a motor vehicle as a helper, but not engaged in the operation of same.

Am merely giving you this clarification statement in order that you might not be caused any confusion through interpreting the two opinions, here referred to, as being in conflict.

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July 15, 1941.—041-380.

MINORS—EMPLOYMENT WHERE INTOXICATING LIQUORS SOLD

QUESTION: Does Section 5950, Compiled General Laws of Florida, 1927, prohibit the employment of persons under twenty-one years of age from working in a place selling beverages under a license issued under Section 5, Subdivision 2, Chapter 16774, Laws of Florida, 1935?

*Hon. Joseph G. Spicola, Assistant County Solicitor,
Tampa, Florida:*

Section 5950, Compiled General Laws of Florida, 1927, was originally enacted as Section 1, Chapter 5686, Laws of Florida, 1907. This Section was as follows:

"Section 1. No child under twelve years of age shall be employed at any time in any factory or work shops, bowling alley, barroom, beer garden, place of amusement where intoxicating liquors are sold, or in or about any mine or quarry."

In 1913, the Legislature enacted Chapter 6488, and by its terms, repealed the 1907 Act above quoted. Section 10 of Chapter 6488, Laws of Florida of 1913, was as follows:

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"Sec. 10. No person under twenty-one years of age shall be employed, permitted or suffered to work in, about or in connection with any saloon or barroom where intoxicating liquors are sold."

This Section, as amended by Section 1, Chapter 6918, Laws of Florida, 1915, was carried forward into the Revised Statutes, 1920, as Section 4027 and thence into the Compiled General Laws of Florida, 1927, as Section 5950.

Chapter 16774, Laws of Florida, 1935, expressly repealed Section 10 of Chapter 6488, Laws of Florida, 1913.

It is therefore my opinion that Section 5950 is no longer a valid statute and no prosecution can now be had for any violation of its provisions.

However, the 1941 Legislature enacted Chapter 20955, Section 8 of which provides:

"Section 8. That Section 10 of Chapter 6488, Laws of Florida, Acts of 1913, as amended by Chapter 6918, Laws of Florida, Acts of 1915, be and the same is hereby amended to read as follows:

"Section 10. No person under twenty-one (21) years of age shall be employed, permitted or suffered to work in, about, or in connection with any pool room, billiard room, brewery, saloon, barroom, or any place where intoxicating liquors are manufactured or sold."

This Act by its terms became effective on July 1, 1941.

CHILD LABOR

October 13, 1941.—041-572.

MINORS—EMPLOYMENT WHERE INTOXICATING LIQUORS SOLD

QUESTION: Does the Child Labor Law, Chapter 20955, Acts of 1941, prohibit any person under 21 years of age from being employed in a place where liquors, wines and beers are sold?

To Hon. T. H. Hutchinson, State Labor Inspector:

It is first necessary to determine just what is meant by the term "Intoxicating Liquors". "Liquor" is defined as meaning any liquid substance, such as water, juice, etc. However, today in common parlance, we understand the word to mean a liquid containing alcohol, or "Alcoholic Liquor". "Intoxicating Liquors" would therefore mean any liquid substance capable of producing inebriety or intoxication.

"Beer" has been held to be included in the term "intoxicating liquors."

Hackbart vs. Rohrig, 287 NW 665, 136 Neb. 825.

"Wine" is also classed as "intoxicating liquors." See Words and Phrases in Black's Law Dictionary.

The Child Labor Law was enacted for the primary purpose of promoting the welfare and protecting the morals of children.

Section 8 no doubt was intended to prohibit the employment of children in environments which would be detrimental to their welfare. It seems to me, therefore, that with these purposes intended to be ac-

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complished by the Act, in mind, "intoxicating liquors" as used in the Act would ordinarily mean any liquor or beverage which is *in fact* capable of producing intoxication.

However, the Legislature of Florida in 1935, enacted a law which is commonly called "The Beverage Law". (Section 4151 (239) C.G.L. 1927, Permanent Supplement). This Act defines "intoxicating liquors" as follows:

"All liquors, wines and beers containing more than three and two-tenths per cent. of alcohol by weight shall be deemed and held to be intoxicating liquors, wines and beers. The sales of such intoxicating liquors, wines and beers in counties where their sale is prohibited shall be a violation of this law. All persons convicted of such violation shall be punished as herein provided."

And again in 1937 an Act was passed by the Legislature which is now Section 7648 (14) C.G.L. 1927, Permanent Supplement, defining "intoxicating liquors" as follows:

"All liquors, wines or beer containing more than three and two-tenths per cent. of alcohol by weight shall be deemed and held to be intoxicating liquors, wines or beer and subject to the provisions of this law."

These Acts were in force at the time the Child Labor Law of 1941 was passed, and the Legislature was charged with the knowledge of these definitions.

I can not follow the reasoning which has been advanced that inasmuch these definitions use the words "wines" and "beer" in addition to the word "liquor", that wines and beer are not included within the phrase "intoxicating liquors" as used in Section 8 of the Child Labor Law. However, since we have these statutory definitions of "intoxicating liquors" or "intoxicating beverages" (which words I think are synonymous), they should be applied to the term as used in the Child Labor Law.

It is therefore my opinion, that "Intoxicating Liquors" as used in Section 8, Chapter 20955, Laws of Florida, Acts of 1941, means any liquor or beverage, including beers and wines, containing more than three and two-tenths per cent of alcohol by weight. This holding seems to be substantially in accord with an opinion rendered by a former Attorney General on February 24, 1940, holding that Section 5950 Compiled General Laws of Florida (which is substantially the same as Section 8 of the Child Labor Law of 1941), prohibited the employment of persons under twenty-one years of age by persons who were licensed to sell beverages containing more than three and two-tenths per cent of alcohol by weight.

It is further my opinion that this Act prohibits any person under twenty-one years of age from working in any place selling such intoxicating liquors, whether it be a drug store, grocery store, restaurant, or a regular barroom. The Act makes no distinction between a place selling "Intoxicating Liquors" to be consumed off the premises where they are sold, and a place selling such liquors to be consumed at the place of sale, and I can read no such distinction into the Act.

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January 5, 1942.—042-8.

MINORS—EMPLOYMENT WHERE INTOXICATING LIQUORS SOLD

QUESTION: If a place of business completely partitions off a portion of said place of business, obtains the proper license, confines the storage and sales of "intoxicating liquors" to this room, and employs only persons twenty-one years of age or older, either as salesmen or as delivery clerks, would the owner of such business be within the Child Labor Law if he employed minors in his main place of business?

To Hon. E. W. Scarborough, Director, Beverage Department:

Section 8 of the Child Labor Law (Chapter 20955, Acts of 1941) provides that:

"No person under twenty-one (21) years of age shall be employed, permitted or suffered to work in, about, or in connection with any pool room, billiard room, brewery, saloon, barroom, or any place where intoxicating liquors are manufactured or sold."

As I said in my opinion dated October 13, 1941:

"The Child Labor Law was enacted for the primary purpose of promoting the welfare and protecting the morals of children."

I might add that I believe it was the further intent of this Act to protect and safeguard persons under the age of twenty-one (21) years from the recognized evil influence of places manufacturing, handling, or dispensing intoxicating liquors and any employment of minors which brings them in contact with the manufacture or sale of such liquors is prohibited by this Act.

Answering your specific question, it is my opinion that if one partitions off a part of his main place of business to be used for the storage and sale of intoxicating liquors, it would not be a violation of the Child Labor Law (Chapter 20955, Acts of 1941), for such person to employ minors to work in his main place of business, provided the two places were so separated as to constitute in fact two distinct places of business having no connection one with the other, and the minor employees have no duties to perform in, about, or in connection with the place of business where the intoxicating liquors are stored and sold.

CHAPTER XXIV

PROFESSIONS AND VOCATIONS

BASIC SCIENCE LAW

September 25, 1941.—041-551.

BOARD OF EXAMINERS—EXAMINATION REGULATIONS

QUESTION: Does the Board have power to make exception in giving Basic Science examination at time other than that scheduled?

To State Board of Examiners:

The Basic Science Law requires that the Board shall meet at a place selected by the Chairman and there conduct examinations in the Basic Sciences twice a year at a time to be selected by the Board, the examinations to be held approximately six months apart, and that each applicant shall be known by a number only until such examination papers are read and the proper grade determined.

This provision of the law does not require that such examination shall be completed on any one day. I see no reason why your Board could not give the examination on two separate days. Of course you would have to give the same examinations on both days, otherwise you would be giving two different examinations, and the law requires that such examinations shall be held approximately six months apart. Under this view of the law, you would be able to give an applicant, who otherwise cannot stand the examination on the regularly scheduled day, an opportunity to take the examination on some other day. However, you will undoubtedly run into certain practical difficulties in such a situation. For example, if only one person is taking the examination, it may prove to be difficult for such applicant to be known by a number only. However, if your Board is able to work out these practical difficulties to the satisfaction of the Board so that such an applicant may be known by number only, and the integrity of your examinations may be maintained, it is my opinion that your Board, under its power to make such rules as it deems expedient to carry out the purposes of the Act, has the power to make exceptions and give separate examinations in such situations as you have described. In this day and time, when deep and sincere religious convictions are so eminently worth while and necessary in the future welfare of our democracy, it seems that every effort possible should be made to encourage those convictions rather than penalize the person having them.

The law provides that three members of a board shall constitute a quorum for conducting examinations. Under this provision, it would be necessary for an examination of one or more applicants to be proctored by at least three members of your Board.

BASIC SCIENCE LAW

November 28, 1941.—041-666.

BOARD OF MEDICAL EXAMINERS—ISSUANCE OF LICENSE TO PRACTICE THE HEALING ARTS

QUESTION: Has the State Board of Medical Examiners authority to issue a license without a certificate of proficiency in the basic sciences under Chapter 19281, Acts of 1939?

PROFESSIONS AND VOCATIONS—Basic Science Law

To Hon. Spessard L. Holland, Governor:

It is my opinion that neither the State Board of Medical Examiners, nor any other similar board, has the power to examine an applicant or issue a license to practice the healing art, or any branch thereof, until the applicant has first presented to the examining board a certificate of proficiency in the basic sciences.

The Florida Basic Science Act became a law June 12, 1939, and specifically provides, in Section 4 thereof, as follows:

"Section 4. No person shall hereafter be eligible for examination or permitted to take an examination for a license to practice the healing art or any branch thereof or be granted any such license unless and until he has presented to the licensing board or other authority empowered to issue such license, a certificate of proficiency in the basic sciences as provided in this Act. This requirement shall be in addition to all other requirements now or hereafter in effect with respect to the issuance of such license or licenses."

There are certain exemptions provided for in the Basic Science Act, in Section 5, as follows:

"Section 5. This Act shall not be construed as applying to dentists, pharmacists, nurses, optometrists, chiropradists and Christian Scientists practicing within the limits of their respective callings; nor to persons licensed to practice the healing art or any branch thereof in the State of Florida at the time this Act first takes effect, nor to persons specifically permitted by law to practice without licenses who practice each within the limits of the privileges thus granted them."

It is further provided in Section 22 of the Basic Science Act that:

"Any person who knowingly issues or participates in the issue of a license to practice the healing art or any branch thereof (1) to any person who has not presented to the licensing board a valid certificate from the state board of examiners in the basic sciences . . . shall be fined not more than five hundred (\$500.00) dollars or imprisoned not more than one (1) year, or both, in the discretion of the Court."

It is clear from the above quotations that the doctor in question does not come within the express exemptions of the Basic Science Act. However, it is argued in this situation that, having applied to take the medical examination prior to the effective date of the Basic Science Law, and having submitted himself for such examination, which he failed to complete because of illness, he now has a right to a re-examination without first complying with the requirements of the Basic Science Law which became effective shortly after the examination which he was prevented from completing because of illness. However, I can find no support for this claim of vested right.

Our Supreme Court, in the case of *State ex rel. Munch vs. Davis*, 196 So. 491, says that a physician accepting a license to practice medicine in Florida does so with the full knowledge of the State's inherent power to enact laws, promulgate rules and regulations controlling the privilege to practice medicine, and that the privilege, when extended, could or might be withdrawn when it became necessary to preserve health, morals, comfort, safety and good order of society. In my opinion, one who is merely an applicant for a license to practice medicine in Florida is in no stronger position in this regard than a physician who has accepted a license to practice.

The right to practice the healing arts in this State is a privilege subordinate to the police power of the State, and a citizen's right to pursue

PROFESSIONS AND VOCATIONS—Basic Science Law

such a profession must yield to the State's power, in the exercise of its sovereign duty to preserve health, to prescribe such restrictions and regulations as will fully protect the people from ignorance, incapacity, deception and fraud, and one who engages in the practice of such a profession, or is about to become engaged therein, does so with the full knowledge of the power of the Legislature to make further and other regulations as its judgment and discretion shall dictate, and it is not a violation of the vested rights of the licensee or applicant to further regulate the privilege he seeks to enjoy.

And so it is my opinion that, irrespective of the facts involved, the examining board in the healing arts, or any branch thereof, may not now, since the effective date of the Basic Science Act, examine an applicant nor issue to such person a license to practice the healing art, or any branch thereof, unless and until such applicant has first submitted to the examining board a certificate of proficiency in the basic sciences as required by Chapter 19281, Laws of Florida, Acts of 1939, unless such applicant comes within the express exemptions of the Basic Science Act.

BASIC SCIENCE LAW

December 13, 1941.—041-687.

ELECTROLYSIS—DEFINITION—CERTIFICATE OF PROFICIENCY

QUESTION: Under the Basic Science Act of 1939 is a person practicing electrolysis required to have a certificate of proficiency in the basic sciences as a prerequisite to the issuance to such person of a city occupational license to practice electrolysis?

To State Board of Examiners:

The Basic Science Law provides that no person shall be eligible for examination, or permitted to take an examination, for a license to practice the healing art or any branch thereof, or be granted any such license, unless and until he has presented to the licensing board or other authority empowered to issue such license, a certificate of proficiency in the basic sciences.

Healing arts are defined to include any system, treatment, operation, diagnosis, prescription or practice, for the ascertainment, cure, relief, palliation, adjustment or correction, of any human disease, ailment, deformity, injury, or unhealthy or abnormal physical or mental condition.

The practice of electrolysis, as commonly used, is, as I understand the term, the destruction of hair roots by means of an electric current. In my opinion, the practice of electrolysis, when so limited, is not one of the branches of the healing art, and a certificate of proficiency in the basic sciences would not be a prerequisite to the issuance of a license to practice electrolysis as so defined.

The term "electrolysis" has also been applied to surgical destruction of tumors, calculi and the like, by means of an electric current. The term "calculi," as so used, refers to renal, biliary and similar calculi, meaning calculus formations in the kidneys, gall bladder, etc. If one practicing electrolysis undertakes thus to treat one for gall stones or kidney stones, or the like, such a person is, in my opinion, engaged in practicing the healing art, and would come within the provisions of the Basic Science Act requiring him to have a certificate of proficiency in the basic sciences before securing a license to practice this particular branch of the healing art.

PROFESSIONS AND VOCATIONS—Basic Science Law**BASIC SCIENCE LAW**

September 23, 1942.—042-459.

METAPHYSICAL HEALING—REQUIREMENTS TO PRACTICE

QUESTION: Must one wishing to practice metaphysical healing first obtain from the State Board of Examiners in the Basic Sciences a certificate of proficiency in the basic sciences?

To Hon. John F. Conn, Secretary, State Board of Examiners:

The basic science law provides that no one shall be eligible for examination, or permitted to take the examination for a license to practice the healing art, or any branch thereof, or be granted any such license unless and until he has presented to the licensing board, or other authority empowered to issue such license, a certificate of proficiency in the basic sciences, which are enumerated as anatomy, physiology, chemistry, pathology and bacteriology.

The healing art is defined as including any system, treatment, operation, diagnosis, prescription or practice for the ascertainment, cure, relief, palliation, adjustment or correction of any human disease, ailment, deformity, injury or unhealthy or abnormal physical or mental condition.

Metaphysics has been defined as the science of being; the science which deals with ultimate reality; the philosophy of life; the science beyond experience; the realm of transcendental rumination and of speculation of the philosophers.

The letter and information accompanying your request, and furnished to you by the applicant, sets out the titles of what is alleged to be the 33 basic principles of metaphysical healing and the 30 basic principles of practical metaphysics. The applicant further states that the study of metaphysical healing deals with the subject of healing in a very comprehensive way, and gives specific direction for the handling of various cases. Some of the specific claims made for metaphysical healing are as follows: cause and cure of insanity; the cure of paralysis; the cause and cure of heart trouble; the cure of indigestion and constipation; the cure of kidney and bladder trouble; the cure of female troubles and treatment for easy childbirth.

The practice of metaphysical healing is neither recognized nor regulated as such by the laws of this state. However, if one undertakes, through the practice of metaphysics, to diagnose, treat and cure human diseases or ailments, whether physical or mental, such undertaking, in my opinion is the practice of the healing art or some branch thereof, as defined in your act.

There are certain exemptions from the basic science law, that is, this law does not apply to dentists, pharmacists, nurses, optometrists, chiropractors and Christian Scientists practicing within the limits of their respective callings, nor to persons licensed to practice the healing art or any branch thereof in the State of Florida on September 10, 1939, nor to persons specifically permitted, by law, to practice without license who practice each within the limits of the privileges thus granted them.

Metaphysical healing is close akin to Christian Science. As a matter of fact Mrs. Mary Baker Eddy, the founder of Christian Science, defined it as being "Divine Metaphysics." However, in order for a metaphysician to qualify and practice metaphysical healing under this exemption in the basic science law, he must be practicing as a recognized and duly authorized Christian Scientist.

PROFESSIONS AND VOCATIONS—Basic Science Law

The object of the law regulating the practice of the healing art is to secure the safety and protect the health of the public. Such laws are based upon the assumption that to allow any incompetent person to determine the nature of disease and to prescribe remedies therefor, would result in injury and loss of life. Thus, to protect the public, not from theories, but from the acts of incompetent persons, the Legislature has prescribed the qualifications of those who may be entitled to perform the important duties of practitioners of the healing art. Such regulatory laws are not for the purpose of compelling persons suffering from disease to resort to remedies or to patronize the practitioner of any particular school, but rather are designed to secure to those persons desiring remedies competent practitioners to prepare and administer them.

Therefore, it is not my purpose, in this opinion, to pass upon the efficacy of any form or branch of the healing art nor to unnecessarily restrict or curtail the practice of divine or spiritual healing. I merely express my opinion that one who holds himself out to the public as being able to diagnose human ills and professes to be able to and does undertake to cure the same, through metaphysics or metaphysical healing, is practicing the healing art or some branch thereof, as defined by your act, and must comply with all the regulatory laws with reference thereto.

The practice of metaphysical healing is not, in my opinion, comprehended in any of the various laws regulating the different branches of the healing art. However, one desiring to follow this particular calling, even though it is not regulated by law, must secure the necessary occupational license for the privilege of practicing such profession and before being entitled to receive such license he must present to the licensing authorities a certificate of proficiency in the basic sciences from your Board.

BASIC SCIENCE LAW

September 25, 1941.—041-550.

PHYSIOTHERAPISTS—PROCEDURE TO PROCURE LICENSE

QUESTION: What is the procedure to be followed in order to procure a license to practice physiotherapy?

To State Board of Examiners:

Under the Florida law the healing art is understood to include any system, treatment, operation, diagnosis, prescription or practice for the ascertainment, cure, relief, palliation, adjustment or correction of any human disease, ailment, deformity, injury, or unhealthy or abnormal physical or mental condition, and one practicing the healing art or any branch thereof is required to have a license therefor.

The laws of Florida do not recognize or regulate physiotherapists as such. However, physiotherapy is, in my opinion, a branch of the healing art and one practicing physiotherapy must have a license to practice some branch of the healing art which would comprehend physiotherapy.

Physiotherapy is one of the courses of study included in the curriculum of a standard college of osteopathy, and because of this it is my opinion that one wishing to practice physiotherapy may first obtain a license to practice osteopathy and then specialize in physiotherapy as one of the component parts of osteopathy. It is also my opinion that one duly licensed to practice medicine by the State Board of Medical Examiners may also specialize in physiotherapy.

In its final analysis, it is my opinion that one wishing to practice physiotherapy must first obtain a license to practice some recognized

PROFESSIONS AND VOCATIONS—Basic Science Law

and regulated branch of the healing art which comprehends and includes physiotherapy, which then would entitle the holder of such license to specialize in the field of physiotherapy.

BASIC SCIENCE LAW

October 14, 1941.—041-596.

SWEDISH MASSAGE—LICENSE TO PRACTICE

QUESTION: Is it necessary to have a license to practice Swedish Massage, and, if so, what is the fee, and to whom should application be made, for such license?

To State Board of Examiners:

You refer to an opinion dated November 2, 1939, rendered by the Honorable George Couper Gibbs, then Attorney General of the State of Florida, wherein it was held that Swedish massage was not a branch of the healing art as defined in the Basic Science Law, and therefore one practicing Swedish massage would not be required to take the basic science examination. I think this opinion by former Attorney General Gibbs is sound.

Neither massage nor Swedish massage is regulated by statute in this state. However, Section 10 of Chapter 20956, Acts of 1941, provides that:

"Every person engaged in the practice of any profession, whether or not such profession be regulated by law, shall pay a license tax of \$10.00 for the privilege of practicing, which license tax shall not relieve the person paying same from the payment of any license tax imposed on any business operated by him."

Thus it would be necessary for one practicing Swedish massage to pay the \$10 license mentioned in Section 10, *supra*. This license fee is payable to the Tax Collector of the County wherein the person intends practicing. In addition, there is a fee of 25c for issuing the license.

MIDWIFERY

February 12, 1942.—042-80.

REGISTRATION FEES—REFUND

QUESTION: What disposition should be made of registration fees collected by the State Board of Health from midwives?

To State Board of Health:

The only authority for the collection of these registration fees was Chapter 12005, Laws of Florida, Acts of 1927, which was supplemented and by implication repealed by Chapter 14760, Laws of Florida, Acts of 1931. The State Board of Health was therefore without authority to impose and collect registration fees from midwives for the year 1942.

It is my opinion that the State Board of Health is authorized to refund all of such registration fees collected for the registration of midwives for 1942 which it still has in its possession and has not been covered into the State Treasury. (*St. Johns Electric Co. vs. City of St. Augustine*, 88 So. 387; *City of Orlando vs. Gill*, 174 So. 224.)

PROFESSIONS AND VOCATIONS—Midwifery**MIDWIFERY**

January 19, 1942.—042-34.

REGISTRATION FEES—REGULATIONS

QUESTION: (1) Shall one lawfully licensed to practice midwifery in the State of Florida apply annually to the Secretary of the State Board of Health for a certificate of Registration and the payment of a fee of \$1.00?

(2) Shall every person who has obtained from the State Board of Health a license to practice midwifery in the State of Florida be required to have such license recorded in the office of the Clerk of the Circuit Court in the county of the residence of the midwife, or in the county in which such midwife intends to practice?

To State Board of Health:

(1) The only authority I find authorizing the State Board of Health to charge this registration fee of \$1.00 is Section 2 of Chapter 12005, Laws of Florida, Acts of 1927, which is as follows:

"That every person now lawfully engaged in the practice of medicine, osteopathy, chiropractic, naturopathy, midwifery and other medical and/or material systems of healing and every other person hereafter duly licensed to practice the same shall, on or before the 1st day of January of each year, apply to the Secretary of the State Board of Health for a Certificate of Registration upon a blank form to be furnished by such Secretary and shall pay at such time a fee of One (\$1.00) Dollar."

However, Chapter 12005, Acts of 1927, was superseded by Chapter 14760, Acts of 1931, and this Act does not provide for the payment of any registration fee.

It is therefore my opinion that the first paragraph of Section 3 of the proposed regulations governing the practice of midwifery in Florida which requires the payment of a fee of \$1.00, is invalid.

(2) Section 4 of the proposed regulations requires every person who has obtained from the State Board of Health a license to practice midwifery in the State of Florida, to have such license recorded in the office of the Clerk of the Circuit Court in the county of the residence of the midwife, or in the county in which such midwife intends to practice. The only authority for this provision is likewise Chapter 12005, Acts of 1927, and as stated above, this Act insofar as it relates to the practice of midwifery, was superseded by Chapter 14760, Acts of 1931.

It is therefore my opinion that Section 4 of the proposed regulations is invalid.

As there is no valid statute requiring a midwife to have her license recorded in the office of the Clerk of the Circuit Court, the words "when properly recorded in the county and," in the third paragraph of Section 3 of the proposed regulations should be eliminated.

With these exceptions, it is my opinion that the proposed regulations are fair and reasonable and are fully authorized under the provisions of Chapters 14760 and 14906, Acts of 1931, and Chapter 19366, Acts of 1939, and upon adoption and promulgation by the State Board of Health and the State Health Officer they will constitute valid and enforceable regulations.

PROFESSIONS AND VOCATIONS—Physicians**PHYSICIANS**

November 5, 1941.—041-634.

BOARD OF MEDICAL EXAMINERS—APPOINTMENT OF DIRECTOR OF NARCOTICS TO TESTIFY REGARDING RECORDS

QUESTION: The Bureau of Narcotics has been actively engaged in the suppression of the illegal practice of medicine; many court cases result from the investigations, and since the Secretary of the Board of Medical Examiners is a practicing physician who serves without pay, it is not possible for him to attend the various courts in the State to testify as to whether or not the defendant is licensed to practice medicine. May the Director of Narcotics be appointed as Assistant Secretary by the Board of Medical Examiners to have custody of the records?

To State Board of Health:

With reference to the Secretary-Treasurer of the State Board of Medical Examiners, Section 3414, Compiled General Laws of 1927 provides:

"It shall be the duty of the secretary-treasurer, under the direction of the board, personally or by deputy to aid the prosecuting attorneys of the State in the enforcement of this Chapter and in the prosecution of persons charged with violation of its provision."

This provision appears to contemplate that a deputy of the secretary-treasurer may be appointed to perform the acts required to assist the prosecuting attorneys in cases such as you describe.

It would seem, therefore, that under this provision the State Board of Medical Examiners could appoint the Director of Narcotics as a deputy to have custody of the records of that board, under the supervision of the secretary-treasurer, so that such deputy would be qualified to testify as to those records in Court.

This is a question, however, that will have to be finally decided by the Courts when the testimony is offered.

PHYSICIANS

October 3, 1942.—042-474.

MILITARY SERVICE—FEES—WAIVER

QUESTION: Practitioners of the healing arts are required to register with the Secretary of the State Board of Health on or before January 1 of each year and pay a fee of \$1 under the provisions of Chapter 12005, Laws of Florida, Acts of 1927.

In this connection are such practitioners in the armed services required to register annually and pay the \$1 fee?

To Hon. Henry Hanson, State Health Officer, Florida State Board of Health, Jacksonville, Florida:

I have checked Chapter 12005, supra, and find that said law was not brought forward and included in the Florida Statutes 1941, and therefore is no longer operative.

I have also checked the various individual Acts regulating the different branches of the healing arts, and I find that only osteopaths and physicians licensed and registered by the State Board of Medical Examiners, are required to register annually with the Secretary of the State Board of Health and pay the \$1 license fee.

PROFESSIONS AND VOCATIONS—Physicians

With reference to physicians licensed by the State Board of Medical Examiners and osteopathic physicians serving in the armed forces of our country, it is my opinion that the annual registration with the Secretary of the State Board of Health, and the payment of the aforesaid \$1 fee, may be waived without affecting their civil status as practitioners of the healing art in this State.

OSTEOPATHS

May 2, 1942.—042-224.

APPLICANTS—EDUCATIONAL REQUIREMENTS

QUESTION: May recognized osteopathic colleges eliminate the vacation periods and thereby shorten or reduce college attendance from four calendar years to three calendar years?

To State Board of Osteopathic Medical Examiners:

The statutes of this state with reference to the practice of osteopathy require that the applicant shall be a graduate of a professional school or college of osteopathy which requires as a prerequisite to graduation a four years' course of nine months each.

A standard college of osteopathy is defined by our statute as a legally chartered osteopathic college requiring before granting a degree of Doctor of Osteopathy an actual attendance at such osteopathic college of at least thirty-six months or four terms of nine months each.

It makes no particular difference, so far as the statutory requirements are concerned, whether the course of study is completed in thirty-six consecutive months or stretched out over a period of forty-eight months. One who has completed a prescribed course of study in a standard college of osteopathy, whether it is completed in thirty-six months or longer, may, in my opinion, be legally permitted to take the examination for a license to practice osteopathy in the State of Florida. You understand, of course, that no one may now be granted a license to practice osteopathy in the State of Florida until such person has obtained a certificate of proficiency in the basic sciences from the Basic Science Board.

OSTEOPATHS

September 21, 1942.—042-457.

BOARD OF EXAMINERS—QUALIFICATIONS FOR APPOINTMENT TO MEMBERSHIP

QUESTION: Is one who has been engaged for only one year as a legally licensed osteopathic physician in this state eligible to appointment as a member of the State Board of Osteopathic Medical Examiners?

To Hon. Spessard L. Holland, Governor:

The particular appointee to whom you refer, Dr. R. S. Berry, was commissioned by you on August 21, 1942 as a member of the State Board of Osteopathic Medical Examiners and from the letter attached to your request it appears that he has been practicing as an osteopathic physician for only one year.

Section 459.05, Florida Statutes 1941 which became effective thirty days after your proclamation on June 29, 1942 with reference to appointment to membership on this examining board in part provides:

PROFESSIONS AND VOCATIONS—Osteopaths

"The governor shall appoint or re-appoint two examiners each year who shall be regularly licensed osteopathic physicians in good standing in this state, and who have been so engaged for a period of at least two years immediately prior to their appointment."

It is therefore my opinion that the appointee in question is not eligible to serve on said board since he had not been engaged as a legally licensed osteopathic physician in this state for a period of two years immediately prior to his appointment on August 21, 1942.

OSTEOPATHS

September 29, 1941.—041-552.

HEALTH CERTIFICATES—ISSUANCE

QUESTION: Have osteopathic physicians authority to issue health certificates under Section 3382, Compiled General Laws of Florida, in connection with examinations of hotel, boarding house, restaurant or lunch counter employees preparing or handling foods, drinks, dishes, towels, linens, etc.?

To Hon. David R. Shull, President, State Board of Osteopathic Examiners, DeLand, Florida:

The pertinent part of Section 3382, *supra*, provides as follows:

"All such employees shall furnish health certificates signed by a registered licensed physician or family practitioner of the State of Florida whenever the Hotel Commissioner or Inspector in his discretion deems it necessary for the protection of public health."

With reference to osteopathic physicians, I find that Section 3429, Compiled General Laws, provides that:

"Osteopathic physicians and surgeons shall observe and be subject to all state and municipal regulations relative to reporting births and deaths and all matters pertaining to the public health, with equal rights and obligations as physicians of other schools of medicine, and such reports shall be accepted by the officers of the departments to which the same are made."

I also find that our law makes physicians and surgeons of the osteopathic school of medicine of equal rank and grade as the physicians of the other three schools of medicine designated as allopathic, homeopathic and eclectic, and endows them with all similar rights except to use drugs not taught in standard colleges or schools of osteopathy.

A standard college of osteopathy under our law is defined as one which teaches, among other things, the following: bacteriology, histology, physiology, hygiene, dietetics, genito-urinary diseases, respiratory diseases, acute and infectious diseases, syphilis, diagnosis (physical, laboratory and differential), diseases of the eye, ear, nose and throat, and dermatology.

Section 3426, Compiled General Laws, provides that each applicant who successfully passes the osteopathic examination shall be entitled to a license which carries with it the title of doctor and physician.

In his work on Medical Jurisprudence, Dr. Benton S. Oppenheimer, Professor in the College of Medicine at the University of Cincinnati, in defining the terms "medicine", "physician", and "surgeon", said:

PROFESSIONS AND VOCATIONS—Osteopaths

"In its commonly accepted meaning, *medicine* is that science or system of knowledge which has for its province the preservation of health or the treatment of disease or bodily injury. It has to do with the study of the nature and causes of disease and the methods of preventing, curing or alleviating as well as the treatment of injuries. A *physician* is one who practices the art of healing disease or preserving health—and a *surgeon* is one who undertakes to cure disease or injuries by manual treatment or the use of mechanical instruments or appliances."

After giving a very exhaustive discourse on the subject "Medicine" and the "Practice of Medicine," the Supreme Court of Alabama, in the case of *Bragg vs. State*, 32 So. 767, 770, said:

"While it is true, as we said above, there have always existed differences among physicians as to the therapeutic agencies that should be employed in the treatment of diseases, yet it has never been supposed that the disciples of any particular school of the healing art were physicians—practitioners of medicine—and those of a different school or sect were not."

The Supreme Court of Illinois, in the case of *People vs. Siman*, 115 N.E. 817, 818, said:

"A 'physician' is one versed in or practicing the art of medicine, and the term is not limited to the disciples of any particular school . . . in common acceptance, anyone whose occupation is the treatment of diseases for the purpose of curing them is a physician."

In construing a statute regulating the practice of medicine, the Supreme Court of Wisconsin, in the case of *State vs. Schmidt*, 119 N.W. 647, 650, defining the term "physician", said:

"Manifestly, the Legislature conceived that it was dealing with the entire class of persons known as physicians, in the broad sense of the term, not in any narrow sense, which would favor those claiming, and perhaps entitled to superior distinction. The purpose was very far from that of creating a monopoly in favor of special schools of medicine. The term was evidently used in its proper sense, that of including any person of whatever school, and whether belonging to any known school, engaged in good faith, in treating human ills by any remedy, or remedies, however simple, so as to be known among the people as a physician."

On December 28, 1939, this office under a former administration rendered an opinion on this subject which has been reported on Page 541 of the 1939-1940 Biennial Report of the Attorney General. In that opinion, it was stated that only a physician who has passed the State Board of Medical Examiners would be qualified to make such a health certificate as is contemplated by Section 3382, *supra*. However, in view of the foregoing statutes and decisions, I am unable to agree with that opinion, and the same is hereby specifically reversed and rescinded.

In view of the statutes and decisions hereinbefore referred to, it is my opinion that registered, licensed, osteopathic physicians come within the term "registered, licensed physician or family practitioner of the State of Florida" as used in Section 3382, and therefore have a right to issue health certificates authorized by said section which should be recognized and accepted by the officers of the departments requiring such certificates.

OSTEOPATHS

April 18, 1941.—041-212.

LICENSE FEES—DISPOSITION

QUESTION: What is the proper disposition of funds collected under Chapter 19066, Acts of 1939 from osteopathic medical physicians and

PROFESSIONS AND VOCATIONS—Osteopaths

surgeons as renewal and restoration fees in connection with their licenses to practice in the State of Florida?

To Hon. M. G. Hunter, D. O., President, Florida Association of Osteopathic Medical Physicians and Surgeons:

The law to which you refer contains no provision for the disposition of the funds derived under said Act. It does refer to "The two day educational program as conducted by the Florida Association of Osteopathic Physicians and Surgeons." However, no provision is made in the law for financing that program with the funds derived from the fees set up under the Act. It is my belief that an amendment to the Act would be necessary before the funds could properly be used for that purpose.

As a matter of fact, Chapter 19066, Laws of Florida, 1939, contains no provision whatever for the use of the funds collected thereunder.

With respect to the compensation of the members of the State Board of Osteopathic Medical Examiners, Section 3421, Compiled General Laws of Florida, 1927, provides that such compensation shall be fixed by the by-laws of said Board, but in no case shall it exceed the fees collected from applicants. The fees referred to are, in my opinion, the ones provided for in Section 3422, Compiled General Laws, 1927, and do not contemplate any of the fees authorized by Chapter 19066, Laws of Florida, 1939.

OSTEOPATHS

June 3, 1941.—041-308.

LICENSE FEES—DISPOSITION

QUESTION: May the State Board of Osteopathic Medical Examiners, under Chapter 19066, Acts of 1939, use the funds collected by said Board for the payment of expenses incident to putting on the educational program for the State Association of Osteopathic Physicians?

To State Board of Osteopathic Medical Examiners:

Chapter 19066, Laws of Florida, Acts of 1939, provides for the collection by the State Board of Osteopathic Medical Examiners of a \$5.00 annual renewal fee from persons legally licensed to practice osteopathic medicine in the State of Florida.

This Chapter contains no provision for the disposition of the renewal fees collected thereunder. Undoubtedly the collection of these renewal fees and the enforcement of Chapter 19066 imposes additional duties upon the Board which no doubt requires additional clerical help and added expense for the Board. In my opinion the Board may properly defray these additional expenses out of the fees collected under Chapter 19066.

With reference to the funds remaining after the payment of such necessary expenses, and in the absence of statutory enactment concerning their disposition, and in view of the further fact that those persons practicing osteopathic medicine in the State of Florida are the ones primarily concerned and likewise the ones who have paid these funds into the Board, it is my opinion that the State Board of Osteopathic Medical Examiners may, in its discretion, make such excess funds, or any part thereof, available to the Florida Association of Osteopathic Physicians and Surgeons, to be used by such Association in conducting the two day educational program referred to in Chapter 19066.

With Chapter 19066, *supra*, written as it is, the Florida Association of Osteopathic Physicians and Surgeons cannot, as a matter of right,

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demand these funds, nor can the Board of Osteopathic Medical Examiners use these funds in paying their own compensation, which is provided for by Chapter 12287, Section 5, Laws of Florida, Acts of 1927. However, the State Board of Osteopathic Medical Examiners and the State Association of Osteopathic Physicians and Surgeons, in cooperation, may use these excess funds for defraying the expenses of the two day educational program referred to in Chapter 19066, supra, which program, or its equivalent, must be attended by each licensed osteopathic physician or surgeon in the year preceding his application for a renewal of his license to practice that branch of the healing art in the State of Florida.

OSTEOPATHS

June 5, 1941.—041-310.

LICENSES—PRACTICE

QUESTION: Can the State Board of Osteopathic Medicine continue to exchange licenses of those without the State, who previously failed to request such an exchange before the Basic Science Law went into effect, unless such applicant obtains a certificate of proficiency from the Basic Science Board?

To State Board of Osteopathic Medical Examiners:

Section 3420, Compiled General Laws of Florida, 1927, which is Section 4 of Chapter 12287, Laws of Florida, Acts of 1927, is as follows:

"The holder of a license or certificate heretofore issued under the laws of this State authorizing the practice of osteopathy shall present to the said board (State Board of Osteopathic Medical Examiners) said license or certificate and a new license or certificate under this Chapter shall be issued to the holder thereof."

Section 4, Chapter 19281, Laws of Florida, Acts of 1939, (Florida Basic Science Law) provides that:

"No person shall hereafter be eligible for examination or permitted to take an examination for a license to practice the healing art or any branch thereof or be granted any such license unless and until he has presented to the licensing board or other authority empowered to issue such license, a certificate of proficiency in the basic sciences as provided in this Act. This requirement shall be in addition to all other requirements now or hereafter in effect with respect to the issuance of such license or licenses."

Section 5 of the Florida Basic Science Law, in setting up exemptions thereto, provides that:

"This Act shall not be construed as applying to dentists, pharmacists, nurses, optometrists, chiroprodists and Christian Scientists practicing within the limits of their respective callings; nor to persons licensed to practice the healing art or any branch thereof in the State of Florida at the time this Act first takes effect, nor to persons specifically permitted by law to practice without licenses who practice each within the limits of the privileges thus granted them."

I also call your attention to Chapter 19066, Laws of Florida, Acts of 1939, Section 1, wherein it is provided:

"All persons who are now or may hereafter be regularly licensed to practice osteopathic medicine in the State of Florida shall, on or before the first day of January annually hereafter, renew his or her license and pay a renewal fee of \$5.00 each year to the State Board of Osteopathic

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Medical Examiners; . . . Every person failing to renew his or her license within thirty days after the same is due shall automatically forfeit his or her license to practice Osteopathic medicine in the State of Florida but may have his or her license restored upon payment of a restoration fee of \$5.00 for each delinquent year in addition to the renewal fee of \$5.00 and upon presentation of satisfactory evidence of post graduate study of a standard approved by the Board of Osteopathic Medical Examiners of the State of Florida."

There is no time limit provided for in Section 3420, Compiled General Laws, as to when former licenses may be exchanged for new ones under the 1927 law.

The exemption appearing in Section 5 of the Florida Basic Science Law is applicable to persons licensed to practice the healing art, or any branch thereof (which includes Osteopathy) in the State of Florida *at the time the Basic Science Act first became effective*, which was on or about September 12, 1939. This exemption applies to those licensed to practice in Florida as distinguished from those *actually practicing* in Florida.

If some person previously licensed to practice Osteopathy in Florida has failed to renew his or her license, as required by Chapter 19066, *supra*, your Board is without authority to restore such license until the provisions therein set forth are complied with. Chapter 19066 became effective May 15, 1939 but no forfeiture became effective thereunder until thirty days after January 1, 1940, which was subsequent to the effective date of the Florida Basic Science Law.

It is, therefore, my opinion that your Board is authorized to continue to exchange licenses of those from without the State licensed to practice Osteopathy in Florida, who previously failed to secure an exchange of their old Florida license for a new one before the Basic Science Law went into effect, without a certificate of proficiency from the Basic Science Board, provided such person seeking the exchange was licensed to practice in Florida prior to the effective date of the Basic Science Law, and has not automatically forfeited his or her license under Chapter 19066, *supra*, or if so forfeited, has secured restoration of such license as also provided for in said Chapter 19066.

OSTEOPATHS

June 10, 1942.—042-288.

PHYSICIANS AND SURGEONS—HOSPITAL PRIVILEGES

QUESTION: Do osteopathic physicians and surgeons regularly licensed to practice in Florida have a right to treat patients and use the facilities of public hospitals operated and maintained under Chapter 19421, Acts of 1939?

To Hon. James J. McCormick, Chairman, State Board of Osteopathic Medical Examiners, Miami, Florida:

Chapter 19421, Acts of 1939, provides for the operation and maintenance of public hospitals in certain counties of the State having a population of 9000 or more, and less than 11,000, according to the State Census of 1935, and Section 14 of said chapter in part provides:

"In the management of such hospital no discrimination shall be made against practitioners of any regular school of medicine and surgery recognized by the laws of Florida, and all such regular practitioners shall have equal privileges in treating patients in said hospital."

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Osteopathic physicians and surgeons are practitioners of a regular school of medicine and surgery recognized by the laws of Florida.

Also, Section 3429, Compiled General Laws of Florida, 1927, in part provides:

"Osteopathic physicians and surgeons shall observe and be subject to all State and municipal regulations relative to reporting births and deaths and all matters pertaining to the public health, with equal rights and obligations as physicians of other schools of medicine, and such reports shall be accepted by the officers of the departments to which the same are made.

"Osteopathic physicians and surgeons licensed hereunder shall have the same rights as physicians and surgeons of other schools of medicine with respect to the treatment of cases or holding of offices in public institutions."

It is therefore my opinion that osteopathic physicians and surgeons regularly licensed to practice in Florida have a right to treat patients in and use the facilities of public hospitals operated and maintained under Chapter 19421, Laws of Florida, Acts of 1939, on the same basis as other physicians and surgeons who enjoy such privileges.

CHIROPRACTORS

May 22, 1941.—041-267.

BASIC SCIENCE CERTIFICATE—PREREQUISITE FOR EXAMINATION IN NATUROPATHY

QUESTION: May a chiropractor previously licensed to practice in Florida stand the naturopathic examination without first having received a Basic Science Certificate?

To State Board of Examiners in the Basic Sciences, DeLand, Florida:

On March 27, 1941 I rendered an opinion on this question to the Florida State Board of Naturopathic Examiners, from which opinion the following quotation is taken:

"You further inquire if a Physiotherapist who is licensed as a Naturopath, Chiropractor, Osteopath or Medical Physician in Florida can take the examinations from one or more of the different Boards regulating those professions without taking the Basic Science examination. It is my opinion that a certificate of proficiency in the Basic Sciences is a prerequisite to examination by the Boards referred to. It is my opinion that the exemptions set out in Section 5 of the Basic Science Law apply only to those persons who are already practicing the healing art for which they are licensed to practice or permitted by law to practice without license. For example, it is my opinion that one, previously licensed to practice Chiropractic, before taking the examination under your Board, must first present to you a certificate of proficiency in the Basic Sciences."

It is, therefore, my opinion that Dr. Viola Lancaster, to whom you referred in your request for opinion, must present to the Florida State Board of Naturopathic Examiners a certificate of proficiency in the Basic Sciences as a prerequisite to examination by said Board.

CHIROPRACTORS

June 14, 1941.—041-333.

LICENSES—RENEWAL REGULATIONS

QUESTION: Is that portion of Chapter 20360, Acts of 1941, valid, wherein it is required that all persons licensed to practice Chiropractic

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in the State of Florida shall annually renew their licenses with the State Board of Chiropractic Examiners, and as a condition precedent to the renewal thereof, that satisfactory showing shall be made to said Board that such applicant has attended the two-day educational program as conducted by the Florida Association of Chiropractors, or its equivalent, as approved by the State Board of Chiropractic Examiners of Florida, in the year preceding such application for renewal?

To Florida State Board of Chiropractic Examiners:

Naturopaths are required to renew their licenses each year and pay a \$5.00 fee therefor.

In 1937, the Legislature enacted Chapter 19066, Laws of Florida, Acts of 1937, which is almost identical with the Chiropractic Renewal License Act passed in this session and known as Chapter 20360, requiring attendance at a two-day educational program conducted by the Florida Association of Osteopathic Physicians and Surgeons, as a condition precedent to the renewal of their license.

The Act authorizing your Board to issue original licenses to practice Chiropractic places no time limit upon the life of such licenses. Chapter 20360 of the Acts of 1941, read in connection with the former Law, is a permissible limitation of one year upon the life of such licenses.

A citizen's right to pursue a profession, such as that of practicing any branch of the healing art, must yield to the State's power in the exercise of its sovereign duty to preserve public health, to prescribe such restrictions and regulations as will fully protect the public from ignorance or incapacity.

It is a mistaken conception of the nature of any calling, professional, commercial or industrial, that it is invested with such sanctity as to exempt it from reasonable regulations.

The ever expanding exercise of the police power manifested in the enactment of regulatory statutes embracing every possible vocation demonstrates the fallacy of any such conception.

In protecting the health and general welfare of the public, the Legislature can prescribe reasonable rules and regulations controlling the practice of the healing arts. The purposes of such statutes are in some instances, like the one now in question, to encourage efficiency and, in others, to promote sanitation whereby, in the first, incompetency may be eliminated, and, in the second, the public health preserved.

If the Legislature can require a certain standard of efficiency, as a condition precedent to the issuance of an original license, it may, by the same token and under the same power, require that the standard be maintained by participation in educational programs calculated to keep the participants in touch with the current developments of their particular profession and, so far as possible, prevent such participants from becoming inefficient through mental inertia.

It is, therefore, my opinion that Chapter 20360, Laws of Florida, Acts of 1941, is not an oppressive legislative enactment or an invasion of an inherent right and may be enforced as a valid regulation of the practice of Chiropractic by the Legislature.

CHIROPRACTORS

January 13, 1942.—042-19.

MILITARY SERVICE—RENEWAL LICENSE FEES

QUESTION: Should chiropractors licensed to practice in Florida be required to pay their annual renewal license fees and attend the two-

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day educational program conducted by the Florida Association of Chiropractors, as required by Chapter 20360, Acts of 1941, when such chiropractors are serving in the military forces of the United States?

To Dr. D. I. Rainey, Secretary, Florida State Board of Chiropractic Examiners:

Chapter 20360, Acts of 1941, requiring all licensed chiropractors to renew their licenses each year, and to attend the two-day educational program conducted by the Florida Association of Chiropractors, was enacted by the Legislature at its 1941 session, and at that time the Legislature did not contemplate the present national emergency. Therefore, the Act does not contain any express provisions with reference to the subject-matter of this opinion. However, the clear intent of the Federal law relating to service in the military forces of the United States during the present emergency is to protect, so far as possible, the civil rights of persons serving in the armed forces of this country. Such persons are considered as being on furlough or leave of absence from their civil occupations or employments during the period of time they are serving in the military forces of the United States.

Since this is true, your Board, on the basis of public policy alone, would be justified, in my opinion, in treating chiropractors actually serving in the military forces of the United States, as being on furlough or leave of absence from their private practice, and waiving, so far as such chiropractors are concerned, the requirements of Chapter 20360, Acts of 1941, relating to renewal of licenses and attendance upon the two-day educational program, as required in said Act. Such a waiver would not, in my opinion, subject such chiropractors to the requirements of the Basic Science law upon their return to active practice.

CHIROPODY

August 19, 1942.—042-404.

PRACTICE IN FLORIDA—QUALIFICATION BY CORRESPONDENCE COURSE

QUESTION: Would the taking of a correspondence course qualify or enable any person to enter upon the treatment of foot ailments and deformities on a professional basis, accepting fees or other compensation therefor, in and under the laws of the State of Florida?

To Hon. C. E. Dunbar, Post Office Inspector, Washington, D. C.:

The practice of "chiropody" or "podiatry" in this state is regulated by statute (Chapter 461, Florida Statutes 1941), and is defined as the diagnosis, medical, surgical, palliative and mechanical treatment of ailments of the human foot or leg, except the amputation thereof, and includes the use and prescription of local anesthetics.

It is unlawful to practice chiropody in this state without first obtaining from the State Board of Chiropody Examiners a chiropody license.

The qualifications of one wishing to practice chiropody or podiatry (the statute defining the two as being identical) in Florida, are specified by statute as follows:

"Any person who shall furnish to the board of chiropody examiners, satisfactory proof that he is twenty-one years of age or more, a bona fide citizen of the United States and of good moral character, and shall make oath that he has not been convicted of any offense that would

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constitute a felony either in Florida or any other state or country, shall present a diploma from a chiropody or podiatry school which requires for graduation a course of study of at least three years, said school approved by the board of chiropody examiners, and passes an examination conducted by said board in the studies of anatomy, chemistry, dermatology, materia medica, pathology, physiology, surgery and clinical and orthopedic podiatry, limited in scope to the treatment of the foot and leg, (minimum requirements for license shall be a general average in the said examination of seventy-five per cent in all subjects involved and not less than fifty per cent in any one subject), and pay an examination fee of fifty dollars, which shall accompany the application to the secretary-treasurer of the board of chiropody examiners, shall be entitled to be registered and to be issued a certificate or a license to practice chiropody."

The statute further provides that anyone who, not then being lawfully licensed and authorized to practice chiropody in this state, practices or advertises to practice chiropody, shall upon conviction thereof be punished by a fine of not more than \$500 or by imprisonment in the county jail for not exceeding six months.

I am informed by one of the members of the State Board of Chiropody Examiners that they do not approve correspondence courses in chiropody, and only approve such schools of chiropody as are approved by the Council on Education of the National Association of Chiropody, which in my opinion is within the powers and authority of the Board.

It is, therefore, my opinion that the treatment of foot ailments and deformities on a professional basis, accepting fees or other compensation therefor, in the State of Florida, would constitute practicing of chiropody, and that the taking of a correspondence course would not qualify or enable any person to legally enter upon the performance of such treatment and the practice of chiropody in this state.

NATUROPATHY

August 19, 1942.—042-414.

BOARD OF EXAMINERS—REVOCATION OF LICENSES

QUESTION: Can the pleas of nolo contendere entered in the Federal Court on April 9, 1942, by Dr. Julio Gavilla and Dr. Lyle P. Johnson to a charge of using the United States mail to defraud, be used by the State Board of Naturopathic Examiners as a basis for revoking their licenses to practice naturopathy in the State of Florida?

To Dr. T. W. Evans, Secretary-Treasurer, State Board of Naturopathic Examiners, 1380 West Flagler Street, Miami, Florida:

These doctors were charged in Federal Court with the offense of using the United States mail to defraud, and on May 16, 1942, I rendered an opinion to you wherein I held that such offense constituted a felony within the meaning of your Act which provides that a felony shall be the conviction of any offense which, if committed within the State of Florida, would constitute a felony under the laws of this State.

On April 9, 1942, each of these doctors entered a plea of nolo contendere in the Federal Court to the offense charged, and thereupon the Court entered a judgment of conviction of the offense charged in the indictment, to-wit, use of United States mails to defraud, and upon such judgment of conviction they were committed to the custody of the Attorney General of the United States for imprisonment for a period of

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two years. Execution of the sentence for each doctor was then suspended, and they were placed on probation for two years.

It is true that the general rule is that a plea of *nolo contendere* is inadmissible in a civil action for the same act as evidence of the commission of that act by the defendant. In other words, it cannot be used against the defendant in a civil suit to show that he did commit the act charged against him in the criminal case (*Teslovich vs. Firemen's Fund Insurance Company*, 168 Atl. 354). However, when accepted by the Court, such a plea becomes an implied confession of guilt, and for the purposes of the case only, equivalent to a plea of guilty, and when judgment has been entered on the plea, the record is competent evidence of the fact of conviction (22 C.J.S., Section 425).

Cases may be found holding that a sentence upon a plea of *nolo contendere* is a conviction within the terms of a statute applying to second offenses where such statutes depend upon the mere fact of a conviction and sentence (*Twin Ports Oil Company vs. Puroil Company*, 26 Fed. Suppl. 366).

In the case of *Commonwealth vs. Jackson*, 94 Atl. 233 (cited in *Teslovich vs. Firemen's Fund Insurance Company*, *supra*), it was held that a plea of *nolo contendere* filed by school directors in a prosecution for selling their votes precluded them from averring in subsequent quo warranto proceedings to oust them from office, that they had not been convicted of the offense charged, when the statute provided that forfeiture of office should follow a conviction for stated offenses.

Your Act provides that the license or registration of a practitioner of naturopathy may be revoked, suspended or annulled, or such practitioner may be reprimanded upon the ground that he has been convicted of a felony.

If revocation proceedings before your Board were based on the facts charged in the Federal indictment in this case, the plea of *nolo contendere* would not be admissible to prove the guilt of the persons making the plea. However, the only question involved under your Act and in a revocation proceeding before you of this kind, is the fact of conviction of said parties of an offense amounting to a felony, and it is my opinion that the judgment of conviction entered by the Federal Court on the doctors' pleas of *nolo contendere* is admissible for that purpose before your Board and may be used as the basis of revocation proceedings, as contemplated by your Act.

NATUROPATHY

January 15, 1942.—042-26.

PHYSICIANS—HEALTH CERTIFICATES—ISSUANCE—EXAMINATIONS

QUESTIONS: (1) Can a naturopathic physician issue health certificates to beauty shop operators, waiters, waitresses, food handlers, maids or anyone else who is required to have a health certificate?

(2) Has an applicant a vested right which would permit him to be examined by the Florida State Board of Naturopathic Examiners without first obtaining a certificate from the Basic Science Board, when such applicant has made application to the Board for examination prior to the effective date of the Basic Science Act, paid his application fee, written the examination, but failed to pass?

(3) Has an applicant a vested right which would permit him to be examined by the Florida State Board of Naturopathic Examiners,

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without first obtaining a certificate from the Basic Science Board, when such applicant made his application prior to the effective date of the Basic Science Act, paid his application fee, but failed to report for the examination?

(4) Can a physician who now holds a license in the State of Florida as a naturopathic physician, chiropractor, medical physician or osteopath, but who is qualified to take the State Board of another profession, do so without first obtaining a certificate from the Basic Science Board? As an illustration, can a chiropractor already licensed in the State of Florida and qualified to take the Naturopathic Board, do so without first obtaining a certificate from the Basic Science Board?

To State Board of Naturopathic Examiners:

(1) The statutes of this State with reference to the practice of beauty culture require that applicants for examinations to practice such profession shall furnish to the Board a certificate from a practicing medical doctor of this State, that he or she is free from any contagious or infectious disease. Those practitioners licensed to practice the healing art by the Florida State Board of Medical Examiners are commonly known as medical doctors, and, in my opinion, only such doctors are permitted to furnish the health certificates required of applicants for beauty culture examinations.

With reference to health certificates required of waiters, waitresses and food handlers, the statutes require that such certificates shall be signed by a registered licensed physician or family practitioner of the State of Florida. I have previously held that a physician is one who practices the art of healing disease or preserving health, and that one licensed in this State to practice naturopathy is such a physician. Our statutes require that doctors of naturopathy shall observe and be subject to all State, county and municipal regulations in regard to the control of contagious and infectious diseases, the reporting of births and of deaths, and to any and all other matters pertaining to the public health, in the same manner as is required of other practitioners of the healing art.

Under our laws, naturopathic practice employs, among other things, dietetics, hygiene, first aid, and sanitation, and one practicing naturopathy is required to have completed a prescribed course of study in anatomy, physiology, histology, pathology, hygiene and sanitation, chemistry, diagnosis, first aid, and symptomatology. It is, therefore, my opinion that health certificates required under Section 3382, Compiled General Laws, with reference to waiters, waitresses and food handlers, may properly be issued by regularly licensed naturopathic physicians, and, when so issued, should be recognized and accepted by the officers of the departments requiring such certificates.

I find no particular requirements with reference to health certificates for maids. If you have any particular law in mind on maids or anyone else who is required to have a health certificate, and you will furnish me with a citation of such law, I will be glad to give you my interpretation of the same.

(2) and (3) With reference to your second and third questions, I have recently rendered an opinion to the Honorable Spessard L. Holland, Governor, in which I held that:

"The right to practice the healing arts in this State is a privilege subordinate to the police power of the State, and a citizen's right to pursue such a profession must yield to the State's power, in the exercise of its sovereign duty to preserve health, to prescribe such restrictions

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and regulations as will fully protect the people from ignorance, incapacity, deception and fraud, and one who engages in the practice of such a profession, or is about to become engaged therein, does so with the full knowledge of the power of the Legislature to make further and other regulations as its judgment and discretion shall dictate, and it is not a violation of the vested rights of the licensee or applicant to further regulate the privilege he seeks to enjoy."

Therefore, it is my opinion that one who applied to your Board to stand the naturopathic examination prior to the enactment of the Basic Science Act, had no vested right to take such examination subsequent to the enactment of the Basic Science Act without first obtaining a certificate of proficiency from the Basic Science Board.

(4) With reference to your fourth question, see my opinion to your Board dated March 27, 1941 (041-175), and also my opinion to the Board of Examiners in the Basic Sciences dated May 22, 1941 (041-267).

NATUROPATHY

June 7, 1941.—041-328.

PHYSICIANS—BOTANICAL PREPARATIONS—PRESCRIPTION

QUESTION: May duly licensed Naturopathic Physicians prescribe botanical preparations, their derivatives, extracts and compounds?

To State Board of Naturopathic Examiners:

The Florida Law, governing the practice of Naturopathy, recognizes phytotherapy as a permissible method of treatment in that branch of the healing art and phytotherapy relates, generally, to healing with the aid of remedies of botanical origin.

However, Naturopathic Physicians are expressly prohibited, by the Florida Law, from the practice of *Materia Medica* which is that branch of medical science dealing with drugs, their sources, preparations and uses.

It is a matter of common knowledge that there are many drugs and narcotics of botanical origin which are included in *Materia Medica*. It may be that these same drugs and narcotics are likewise contemplated by phytotherapy. Nevertheless, the very law which authorizes the practice of Naturopathy, in the State of Florida, forbids Naturopaths from practicing *Materia Medica*.

There are persuasive treatments of this subject in the Florida case of *Perry vs. Larson*. The District Court Opinion in that case is found in 25 F. Supp. 728 and the Circuit Court of Appeals' Opinion is found in 104 Fed. Rep. 2d 728.

Therefore, one duly licensed to practice Naturopathy in the State of Florida is within his rights in prescribing botanical remedies contemplated by phytotherapy, provided such botanical remedies are not embraced in *Materia Medica*.

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January 15, 1942.—042-25.

PHYSICIANS—BOTANICAL PREPARATIONS—PRESCRIPTION

QUESTION: Which botanical or herb remedies are to be classified as "not embraced in *Materia Medica*"?

To State Board of Naturopathic Examiners:

On June 7, 1941, I rendered an opinion to your Board concerning the practice of phytotherapy by naturopathic physicians, in which opin-

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ion I said "one duly licensed to practice Naturopathy in the State of Florida is within his rights in prescribing botanical remedies contemplated by phytotherapy, provided such botanical remedies are not embraced in *Materia Medica*."

With reference to the above holding, you have subsequently raised the question that there are herb remedies within the scope of phytotherapy which are also within the field of *Materia Medica*, but which you as naturopathic physicians should be entitled to prescribe, and you have requested me to give you my opinion as to which botanical or herb remedies are to be classified as "not embraced in *Materia Medica*."

This request has given me a great deal of concern, because it is true that many herbs or plants used in phytotherapy likewise furnish the basis for many drugs found in *Materia Medica*, and while the law recognizes phytotherapy as a branch of naturopathy, naturopathic physicians are by the same law specifically prohibited from practicing *Materia Medica*.

In your original request you ask for an official opinion concerning the right of a naturopathic physician, licensed under the laws of Florida, to give and prescribe botanical preparations, their derivatives, extracts and compounds. You based your request upon the assumption that phytotherapy, which you are permitted to practice as a naturopathic physician, is the treatment of diseases and infirmities by the use of such botanical remedies.

Benedict Lust, N. D., M.D., has written and published what is known as Naturopathic Pamphlet Series No. 36 on phytotherapy, and from this publication it appears that phytotherapy is also known as herbalism, or the regeneration of the blood by herbal juices. In this work, Dr. Lust says that "The fact which makes the herbs, etc., i.e., their teas or plant juices, particularly effective, is the lesser or greater wealth of nutritive salts, which is always present in them; and not only this, but also the fact that the human digestive system is best able to receive and most easily digest these nutritive salts if contained in plant juices." In his pamphlet, Dr. Lust describes some one hundred twenty-five herbs, and sets forth therein the proper method for their use in the practice of phytotherapy. In studying this work, I have been impressed by the fact that Dr. Lust recommends that practically all of these herbs should be used in the form of a tea brewed from the plants themselves.

I have compared the list of herbs contained in Dr. Lust's pamphlet with *Materia Medica*, and I find that fully fifty per cent of the herbs mentioned by Dr. Lust are also included in *Materia Medica*, as the basis for various drugs described therein. So far as the use of plants in the treatment of disease is concerned, the main distinction between phytotherapy and *Materia Medica* in their uses, appears to be that phytotherapy employs the plants themselves in the preparation of a tea which is then used as the therapeutic, or else the juice of the plant is used as the remedy; whereas, in *Materia Medica* certain substances are extracted from the plant and then used as the basis in the preparation of a standardized and uniform drug, which is then used as the therapeutic.

After a very careful study of this subject, it is my opinion that the law does not authorize naturopathic physicians in practicing phytotherapy to prescribe drugs of a botanical derivation. The use of drugs is commonly understood to pertain to the practice of *Materia Medica*, in which practice the naturopathic physician may not engage. As an example, morphine is, I understand, derived from opium, which is a product of poppy plants. Morphine is, therefore, a botanical derivative, and yet the law does not contemplate that naturopathic physicians may prescribe morphine or other narcotics or dangerous drugs. On the other

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hand, if the poppy plant itself, or a tea brewed therefrom, or juices extracted from such plant, is thought to have any therapeutic value, then such tea or such juices may be used by the naturopathic physician in practicing phytotherapy. In other words, it is my opinion that naturopathic physicians practicing phytotherapy may use the plants, their juices, and teas brewed therefrom, which plants may form the basis of drugs found in *Materia Medica*, but such physicians may not prescribe the drugs found in *Materia Medica* or *United States Pharmacopœia*, which may have as their principal ingredient some botanical extract or derivative.

NATUROPATHY

July 16, 1942.—042-355.

PHYSICIANS—HEALTH CERTIFICATES—ISSUANCE

QUESTION: May registered, licensed naturopathic and chiropractic physicians issue health certificates when asked to do so by the State Hotel Commission or by any other agency requiring health certificates?

To Hon. Hunter G. Johnson, Hotel Commissioner:

On January 15, 1942, I rendered an official opinion to the Florida Board of Naturopathic Examiners on this question, in which I held that naturopathic physicians duly licensed to practice in Florida are authorized to issue health certificates required under the statutes with reference to waiters, waitresses and food handlers, and that such certificates when so issued should be recognized and accepted by the officers of the departments requiring such certificates. In the same opinion I held that only those practitioners licensed to practice the healing art by the Florida State Board of Medical Examiners, and commonly known as medical doctors, are authorized to furnish the health certificates required of applicants for beauty culture examinations. I adhere to and re-affirm the opinion just referred to, as well as the opinion dated September 29, 1941, relating to health certificates by osteopathic physicians, which opinion is referred to in your letter of July 13.

Chiropractic physicians are required by statute to pass an examination in the following subjects: anatomy, physiology, chemistry, bacteriology, pathology, hygiene, chiropractic analysis, orthopedics, and adjusting as taught by recognized chiropractic schools and colleges. In addition, chiropractic physicians are required by statute to observe and be subject to all state and municipal regulations relating to the control of contagious and infectious diseases, sign death certificates, and comply with all laws pertaining to public health, reporting to proper authority as other practitioners are required to do.

The health certificate required of waiters, waitresses and food handlers under the statute must be signed by a registered, licensed physician or family practitioner. The term "physician" or "family practitioner" in my opinion is sufficiently broad to cover chiropractic physicians. It is therefore my opinion that health certificates required of waiters, waitresses and food handlers may properly be issued by regularly licensed chiropractic physicians, and when so issued should be recognized and accepted by the officers of the departments requiring such certificates.

OPTOMETRY

October 15, 1941.—041-703.

LICENSE—REVOCATION

QUESTION: An applicant made the required grade to pass an examination given by the Florida State Board of Optometry. Before cer-

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tificates to successful examinees were mailed out, this particular applicant entered the employ of a registered optometrist who is in one of the department stores. The Florida law prohibits the practice of optometry in connection with lay organizations, corporations, etc. and the Board withheld this applicant's certificate. May an optometrist already connected with a lay establishment take some other optometrist into the establishment as his employee?

To Florida State Board of Optometry, Ocala, Florida:

Section 5 of the Florida Optometry Law among other things provides:

"It shall be the duty of said Board to examine thoroughly every applicant desiring to practice Optometry in this State, and if a majority of said Board shall be satisfied that said person is competent and possesses proper moral character and the knowledge essential to such practice, they shall grant said person a certificate to that effect, signed by the President and Secretary of said Board, and enter the name of such certificate holder on their records as a registered Optometrist."

Under your statement of the facts in this particular situation, the applicant in question, upon making the required grade to pass, was entitled to receive a certificate as a registered optometrist.

However, Section 11 of the Law provides among other things:

"Any certificate of registration granted by said Board as aforesaid, or issued as a renewal or by re-issue may be revoked by said Board, if the person to whom issued, after at least thirty (30) days' notice of a time and place of hearing before said Board, and given an opportunity to be heard, shall be found guilty by the Board of . . . the violation of any of the provisions of this Act."

Under the cited portions of the law, the applicant in question was entitled to receive his certificate, and the Board had no authority to withhold it or revoke it until after the applicant had been given thirty days' notice of a time and place of hearing before said Board and had been given an opportunity of being heard.

Section 11 of the Act likewise provides as follows:

"Likewise it shall be unlawful, for any Optometrist licensed under the provisions of this Act to undertake to engage in the practice of Optometry with any organization, group or lay individual excepting that this shall not prohibit the employment by, or the forming of partnerships between Optometrists duly licensed in the State of Florida, and further excepting any registered Optometrist now engaged in the practice of Optometry with a corporation, lay body, organization, group or lay individual providing that upon the termination of his present contract or agreement he shall be prohibited from engaging with any other corporation, lay body, organization, group or lay individual."

According to the facts stated in your communication, the applicant in question, before receiving his certificate, entered the employ of a registered optometrist who is in one of the large department stores in Miami. You will observe that the last quoted portion of Section 11 of the Act specifically exempts from the provisions thereof the employment by optometrists duly licensed in the State of Florida. You will also note that there is further excepted from the prohibition of that section any registered optometrist now engaged in the practice of optometry with a lay organization.

It is my opinion that an optometrist duly licensed in the State of Florida, who is now connected with a lay organization within the excep-

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tion cited above, may employ another optometrist in connection with his work with such lay organization. However, the employee's connection with the lay organization would necessarily terminate at the same time that his employer's relationship with such lay organization terminated.

NURSING

August 10, 1942.—042-393.

BOARD OF EXAMINERS—ACCEPTANCE OF TRANSFER STUDENTS—AUTHORITY

QUESTION: A review of the file submitted discloses that a training student at St. Vincent's Hospital, Jacksonville, was in March, 1942, doing special training work in psychiatry as an affiliate at Mount Hope Retreat.

While in Mount Hope Retreat, she violated a rule against smoking in her room; as a consequence she was returned to St. Vincent's, her home school, where she was expelled for the offense, expulsion from that institution being automatic upon proof of the violation of the anti-smoking rule in force there.

The file also discloses that the student had only five more months training before completing her training work and becoming a graduate nurse; that she was anxious to become a graduate nurse in order that she might enter some branch of the armed forces and do her part in the defense of her country; that while she did break the anti-smoking rule, and possibly a rule requiring trainees to be in their dormitories by a certain hour, she nevertheless had made good grades in her work and gave promise of becoming a good nurse, otherwise I feel sure the Board of Examiners of Nurses would never have consented to her completing her training even though she be required to complete it in some hospital outside the State of Florida.

After being expelled from St. Vincent's she made an effort to transfer to another training school in order to complete her training. The question of approving her transfer then came before the Board of Examiners of Nurses, and the Board refused to give such approval, but did consent to her entering a school of nursing in any other state.

By what authority did the State Board of Examiners of Nurses assume to pass upon this proposition, and in doing so did the Board exceed its authority?

To Miss Florence V. Moore, R.N., Secretary-Treasurer, State Board of Examiners of Nurses, 227 S. Orlando Avenue, Winter Park, Florida:

The law creating your Board vests in that body the authority and power to examine applicants and award certificates of registration for nursing in this state. The law also requires the Board to keep a registry of all training schools for nurses in this state which comply with the provisions of such law and rules and regulations adopted by the Board pursuant thereto.

I have before me a copy of the rules and regulations adopted by your Board from time to time and revised in 1942. I find no rule or regulation therein which purports to regulate the acceptance of transfers by the different training schools, nor do I believe the Board would have the authority to adopt any such rule or regulation.

A person seeking an examination at the hands of your Board must show by her application that she is twenty-one years of age or over, that she is of good moral character and has graduated from a training school connected with a hospital approved by the State Board in which such

PROFESSIONS AND VOCATIONS—Nursing

school is located, and must then pass an examination given by the Board on certain subjects specified in the law.

While your Board has the authority and power to approve or reject training schools and to promulgate rules and regulations for the guidance and supervision of training schools, this power of supervision and regulation contemplates a consideration of the curriculum of the training school, the period of time required for completing the training, the facilities available for rendering efficient training, and the capabilities and qualifications of the training and supervisory personnel of such training schools. The law vests no authority in your Board to pass upon who may or may not enter training at such schools. That is a matter left entirely within the discretion of the training school itself, and cannot be influenced, directly or indirectly, by any action or restraint on the part of the Board of Examiners of Nurses. If an approved training school desires to give training to a person who has been expelled from another school for some infraction of its rules, that is a matter to be decided upon exclusively by the school itself and without any hampering restrictions upon such policy by your Board.

The authority of the Board to pass upon the qualifications of the individual trainee comes into play whenever such person becomes an applicant for certification by the Board as a registered nurse, and not before.

It is therefore my opinion that your Board has exceeded its authority in the present case by assuming to pass upon the question of whether or not some approved training school in the State of Florida may permit a student to transfer to that training school and complete her training as a nurse.

I would also like to make this further observation which appears to me to be indicated from the facts of this particular case. We are presently engaged in a terrible war, fighting for our very existence. Millions of our young men, the flower of American manhood, are entering this conflict with the knowledge that many of them will be killed and many more seriously wounded in order that our institutions and way of life may continue to flourish and exist in a state of freedom and liberty. These young men now need, and more and more will require, the tender care of those fine women who have dedicated their lives to the nursing of suffering humanity. For that reason if none other, every encouragement should be given to those who seek to become nurses in order that they too may do their part in the common defense of our country.

Many restrictions, rules and regulations governing situations similar to the present unfortunate one, often serve a laudable purpose in peace time, but frequently during a time of war only serve to hinder the war effort and deprive the country of the services of those who stand ready to give their all in the cause of liberty and freedom.

Even if your Board had the authority which it has assumed in the present situation, the Board's action would be, in my opinion, unreasonable in view of the present emergency, the urgent need for trained nurses in the armed forces, and the comparatively innocuous conduct for which the girl in the present case was expelled and refused permission to transfer to another school.

NURSING

May 22, 1942.—042-253.

BOARD OF EXAMINERS—EXPENSE ACCOUNTS OF MEMBERS

QUESTION: Where the Florida State Board of Examiners of Nurses has ruled that expense accounts for the members should be signed by the President and the Treasurer:

PROFESSIONS AND VOCATIONS—Nursing

(1) If the Treasurer signs these expense accounts, could her bondsmen be held responsible for the money if they were declared by the court illegal?

(2) Would the Treasurer be justified in refusing to sign these expense accounts unless there was an itemized statement made out of what the business of the Board was and it was of such a nature that it would warrant the spending of this money?

To Mrs. Louisa B. Benham, R.N., Secretary-Treasurer State Board of Examiners of Nurses:

(1) With reference to the question of the liability of the Treasurer's bondsmen, it is my opinion that her bondsmen would incur no liability by reason of her approval of such expense accounts in the event they were declared invalid by the court.

(2) With reference to the Treasurer requiring itemized statements of expense accounts, Section 4 of your Act provides that all of the expenses of the Board, including salaries, shall be paid from money received as fees under the provisions of said Act upon vouchers *itemized* and certified to the Comptroller. Under this provision, the Treasurer is not only justified but, in my opinion, it is her duty to require that such expense accounts be itemized and that they show proper charges against the funds of the Board.

NURSING

June 10, 1942.—042-291.

BOARD OF EXAMINERS—OFFICERS AND MEMBERS—DUTIES

QUESTION: What are the duties of the President, Secretary, and members of the Board of Examiners of Nurses who are not officers thereof?

To Mrs. Louisa B. Benham, R.N., Secretary and Treasurer, State Board of Examiners of Nurses, Hawthorne, Florida:

The President is the executive officer of the Board, and it is her duty (1) to preside at all meetings of the Board, (2) to sign all vouchers or requisitions for salaries and expenses to be paid from "State Board of Nurses Funds," (3) sign all certificates of registration and the annual report to the Governor, and (4) preside at all meetings for suspension or revocation of certificates of registration.

The Secretary as such is charged with the following duties: (1) keep a record of proceedings of the Board, including a register of the names of all nurses and training schools registered under the Act, (2) employ necessary secretaries, bookkeepers and stenographers for carrying on the work of the Board, (3) call special meetings of the Board upon written request of any two members, (4) act as custodian of the Board's seal, (5) prepare and sign with the President the annual report to the Governor, (6) publish and mail notices of examinations, (7) issue temporary permits to trained nurses, (8) administer oaths at suspension or revocation hearings, and (9) sign and affix seal to all certificates of registration.

The Secretary is also Treasurer of the Board and as such has the following duties: (1) sign all vouchers for expenses incurred, signature to be notarized, (2) see that all persons handling money under her supervision are properly bonded, (3) receive and transmit all funds of the Board to the State Treasurer to be credited to "State Board of Nurses Funds."

The Secretary is also training school inspector and as such has the following duties: (1) inspect all training schools for nurses existing in

PROFESSIONS AND VOCATIONS—Nursing

the State of Florida, and register such schools as comply with the provisions of the Act and the rules and regulations of the Board.

The members of the Board who are not officers are charged with the following duties: (1) attend and participate in all meetings of the Board, (2) participate in the preparation of all examinations and the holding of same, (3) participate in all deliberations of the Board and all hearings for suspension or revocation of certificates, and (4) look after and attend to such business of the Board as may be delegated to them by the Board.

I also call your attention to the provision of Section 4 of the Act and the provisions of Rule 8 adopted by your Board, both of which provide that "members of the board shall receive . . . all necessary expenses incurred while looking after the business of the board."

NURSING

September 21, 1942.—042-456.

BOARD OF EXAMINERS—PLACE AND PROCTORS FOR HOLDING EXAMINATIONS—RENEWAL FEES

QUESTION: (1) May the Board send a set of examination papers to the State Board Office in another state in order to permit Florida citizens in the armed forces stationed in such other state to take said examination under the supervision of the State Board of the sister state?

(2) Where a registrant has allowed her certificate to lapse may the Board require a new certificate fee of \$10.00 or should the Board merely require the payment of the delinquent annual renewal fees?

To Miss Florence V. Moore, Secretary-Treasurer, State Board of Nurses:

(1) Existing laws with reference to civil rights and status of citizens in the military service of the United States have as their purpose the preservation and protection of those civil rights. In times such as we are presently experiencing many regulations must be waived in order that the rights of our citizens in the armed forces may be maintained and protected. In holding examinations it is the duty of your Board to see that applicants are properly examined and the integrity of your examination preserved. If your Board is of the opinion that the applicants referred to in your request will receive no unfair advantage over other applicants by taking this examination in another state under the proctorship of a corresponding board in that state then it is my opinion that you may lawfully permit the examination to be so taken and supervised. However, the papers should, of course, be forwarded to and corrected by your Board.

(2) With reference to the renewal fee it is my opinion that the Board may not require the payment of a new certificate fee of \$10.00 where the registrant's certificate has lapsed because of non-payment of the annual renewal fees. Penalties for failure to renew a certificate are provided for, I believe, in Section 13 of your act which provides that anyone who shall practice as a trained nurse or in any way represent himself or herself as a trained or registered nurse in this state without holding a certificate or permit as provided for in the act or who shall violate any of the provisions of said act shall be subject to a fine of not less than five dollars or more than fifteen dollars. This penalty, of course, would have to be imposed by a court of competent jurisdiction. In my opinion you may renew certificates upon payment of delinquent annual renewal fees.

PROFESSIONS AND VOCATIONS—Nursing**NURSING**

December 12, 1941.—041-701.

BOARD OF EXAMINERS—POWERS AND DUTIES

QUESTION: (1) Has the Florida State Board of Examiners of Nurses authority to employ a member of said Board to act as license investigator and pay her a salary?

(2) Has the Board authority to employ as an assistant secretary at \$150.00 per month someone not a member of said Board?

To Mrs. Louisa B. Benham, R.N., Executive Secretary-Treasurer, State Board of Examiners of Nurses:

(1) The statute creating the Florida State Board of Examiners of Nurses specifically makes it the duty of the Board to "cause the prosecution of all persons violating" the provisions of said law, and authorizes the Board to "incur the necessary expenses in so doing."

The Constitution of Florida prohibits an officer of this State from accepting any other office of honor or profit under the government of this State or of the United States. In this connection, the members of your Board are State officers, but, in my opinion, one employed by your Board as a special inspector or investigator of licenses is not a State officer.

In prosecuting violations of your regulatory act, it is necessary to incur certain expenses which the Board is authorized to pay. In my opinion, your Board is vested with a certain amount of discretion, in the exercise of which said Board may determine that a special investigator or inspector is necessary in bringing about prosecution under your act. Upon such determination being made by said Board, it may, in my opinion, employ anyone it sees fit as such inspector or investigator, whether a member of said Board or not, and such person's salary to be determined by said Board would constitute a necessary expense incurred in performing the specific duties imposed by the law upon said Board with respect to prosecutions.

(2) With reference to employment of an assistant secretary, the Board may, in my opinion, employ such office and clerical assistants as the Board may determine to be necessary in the performance of the various duties imposed upon it by law, and the salary or salaries therefor to be fixed by the Board may properly be paid out of the funds known as State Board of Nurses' Funds.

However, in employing the assistants referred to in this opinion, no such employee should be employed to perform the duties imposed by law upon the president, secretary, treasurer or training school inspector of your Board.

NURSING

February 10, 1941.—041-45.

TRAINING SCHOOL—DIPLOMAS—REQUIREMENTS

QUESTION: (1) Should a diploma be issued by a registered training school?

(2) Should a certificate be issued by your body to a person who has completed the 36 months' course at the training school and taken the examination there as well as the examination before your Board, though the marks made by such person are not up to the standard set by you?

PROFESSIONS AND VOCATIONS—Nursing*To State Board of Examiners of Nurses:*

Your body as presently constituted was created by Chapter 7831, Laws of Florida, Acts of 1919 (now appearing as Section 3506, et seq. C.G.L.) which superseded the previous act of 1913 (C. 6491). Under this act you are empowered to adopt rules and regulations for the government of your body and for the inspection and registration of training schools for nurses. Among such rules and regulations you may require that certain standards of training be given by the schools for nurses and certain grades be made on examinations before a diploma of graduation may be issued by such training school or certificate of registered nurse be issued by your body. After a diploma has been duly issued without fraud by a training school for nurses and the applicant for a certificate as registered nurse has met the other requirements as to age and moral character, and has paid the required fee, such applicant has a right to take the examination given by you for a certificate, but if the required mark set by you is not made by the applicant you may refuse to issue a certificate as a registered nurse.

PHARMACISTS

September 4, 1941.—041-501.

DRUGS—WHOLESALE DEALERS

QUESTION: Under Section 1 of Chapter 13757, Acts of 1929 can a wholesale place of business lawfully use the title "Drug Sundries" although such place does not employ a registered pharmacist?

To State Board of Health:

A place of business that sells only at wholesale and in the original packages medicinal drugs, medicinal chemicals, pharmaceutical preparations and/or biologicals, may use the title "DRUG SUNDRIES" under the statute, even though a registered pharmacist is not employed. However, a registered pharmacist would have to be employed if those products were compounded or dispensed at that place of business before that title could be lawfully used.

PHARMACISTS

June 24, 1942.—042-317.

MILITARY SERVICES—ANNUAL FEES—EXEMPTION

QUESTION: A number of pharmacists are in the military service and are therefore not practicing pharmacy. Has the Board of Pharmacy authority to exempt such pharmacists from the payment of the annual renewal registration fee as provided by Chapter 19323, Acts of 1939?

To Hon. R. Q. Richards, Secretary-Treasurer, Board of Pharmacy for the State of Florida, Fort Myers, Florida:

Chapter 19323, Acts of 1939 provides:

"Every person registered who desires to continue the practice of pharmacy in the State of Florida shall annually thereafter, during the time he or she shall continue such practice, pay the Secretary of said Board of Pharmacy a registration fee, . . ."

It is my opinion that a pharmacist who has been inducted into the armed forces of the United States is not, during the period of his military service, engaged in the practice of pharmacy within the meaning of Section 2213, R. G. S. 1920, as amended by Chapter 19323, Acts of 1939, and is not, therefore, required to pay the annual registration fee therein prescribed.

PROFESSIONS AND VOCATIONS—Dentistry**DENTISTRY**

May 30, 1942.—042-272.

DENTISTS—MILITARY SERVICE—LICENSE RENEWAL

QUESTION: Has the Florida State Board of Dental Examiners authority to suspend the requirements of Sections 17 and 18 of Chapter 20240, Acts of 1941, requiring the payment of an annual renewal fee and notice of change of address on penalty of requiring another examination before being licensed when dentists now licensed under the Act are engaged in military service?

To Hon. Fred M. York, Chairman, Florida State Board of Dental Examiners:

Chapter 20240, Acts of 1941, known as the Florida Dental Act, and requiring all dentists licensed to practice in Florida to annually renew their licenses, was enacted by the Legislature at a time when the Legislature did not contemplate the present national emergency. Therefore the Act does not contain any express provisions with reference to the subject-matter of this opinion. However, the clear intent of the Federal law relating to service in the military forces of the United States during the present emergency is to protect so far as possible the civil rights of persons serving in the armed forces of this country. Such persons are considered as being on furlough or leave of absence from their civil occupations or employments during the period of time they are serving in the military forces of the United States.

Since this is true, your Board, on the basis of public policy alone, would be justified, in my opinion, in treating dentists actually serving in the military forces of the United States as being on furlough or leave of absence from their private practice, and waiving, so far as such dentists are concerned, the requirements of Chapter 20240, Acts of 1941, relating to renewal of licenses and the penalties therein prescribed for failure to renew such license.

A similar opinion to this was rendered on January 13, 1942, with reference to renewal licenses of chiropractors serving in the military forces of the United States.

FUNERAL DIRECTORS

July 23, 1941.—041-396.

BURIAL—REMOVAL—TRANSIT PERMITS AND APPLICATIONS FOR DISINTERMENT

QUESTION: (1) Is it mandatory that a funeral director be denied a funeral-removal-transit permit by the State Board of Health unless he gives the number of the license issued by the State Board of Funeral Directors and Embalmers?

(2) May the State Board of Health require the applicant for a disinterment permit to give the number of his license issued by the State Board of Funeral Directors and Embalmers?

To Dr. Edward M. L'Engle, Director, Bureau of Vital Statistics, State Board of Health, Jacksonville, Florida:

(1) In the opinions referred to in your letter, it was stated that under Section 3278, C. G. L. 1927, considered with other relevant laws, the local registrars are notified to accept certificates from or refuse to issue burial reports to an undertaker or a funeral director who has not been

PROFESSIONS AND VOCATIONS—Funeral Directors

licensed by the State Board of Funeral Directors and Embalmers. The rule of the State Board of Health requiring that a funeral director who has made a request for a burial-removal-transit permit should give the number of the license issued by the State Board of Funeral Directors and Embalmers is not in conflict with these opinions if the request for the license number is considered as made merely for information purposes, but the rule is in conflict with the opinions if construed to mean that the request for the permit should be denied if the funeral director does not have in fact a license issued by the State Board of Funeral Directors and Embalmers.

(2) Section 21 of Chapter 17950, Laws of Florida, Acts of 1937 (Section 3599 (22) C. G. L. 1940 Supplement) provides:

"It shall be unlawful to disinter a dead human body unless said disinterment is under the direct supervision of a funeral director duly licensed under the terms of this Act."

In view of this statutory provision it seems a reasonable requirement that the applicant for a disinterment permit give the number of his license issued by the State Board of Funeral Directors and Embalmers.

You also asked whether Section 21 above quoted is binding on the State Board of Health and in my opinion it is.

PUBLIC ACCOUNTANTS

May 13, 1941.—041-259.

APPLICANTS—C.P.A. EXAMINATION—CERTIFICATE

QUESTION: Under Section 3922, C.G.L. 1927, is an employee of the Department of Internal Revenue of the United States, who has attained the degree of proficiency therein defined, and who meets the residential requirements therein set forth, entitled upon application to be granted a certificate to practice public accounting as a C.P.A. without examination by the State Board?

*To Hon. Robert Pentland, Jr., Chairman, State Board of Accountancy,
1410 Security Building, Miami, Florida:*

Section 3922, Compiled General Laws of 1927, provides:

"The State Board of Accountancy may, in its discretion, waive the examination of any person possessing the qualifications mentioned in Section 3917 whose record and professional standing are satisfactory to the said board, who shall have practiced public accounting for five years preceding June 1, 1927, of which the three years immediately preceding that date shall have been in Florida, and who shall apply in writing to said board for such certificate before December 31, 1927. Each such applicant shall pay a minimum fee of twenty-five dollars.

"The board may in its discretion grant a certificate as a certified public accountant to such applicant as is engaged in the internal revenue service of the United States who has passed grade number eleven as now established in that service and if he complies with the other requirements of this Chapter, and who is a resident of Florida as defined in Section 3917 on June 1, 1927."

It will be noted that in the first paragraph of Section 3922, the time limit was placed thereupon; to-wit, December 31, 1927. Chapter 15637, Acts of 1931, extended the time provided therein in this language:

"The Board is hereby authorized to accept applications from persons who had the experience required by Section 3922 of the Acts of 1927

PROFESSIONS AND VOCATIONS—Public Accountants

but who failed to apply within the time limit set by such Section, and to extend to any such persons whatever benefits they should have received had applications been properly made, provided such applicants be of good moral character."

Chapter 17266 Acts of 1935 repealed Section 30 of Chapter 15637, Acts of 1931, which is the Section of Chapter 15637 last above quoted. The Supreme Court in the case of Bourne vs. Pentland, et al, 196 So. 606, said:

"Evidently the time was extended by Section 30, Chapter 15637, Acts of 1931, and this Section repealed by Chapter 17266, Acts of 1935."

There is no question, therefore, that no one can now apply for a license under the provisions of the first paragraph of Section 3922, Compiled General Laws of 1927.

The only remaining question to determine is whether or not the next paragraph of Section 3922 relating to the applications of Internal Revenue Agents, is still in force and effect. I have been unable to find any time limit specified in the second paragraph of Section 3922, supra. This particular part of said Section seems to be a complete provision with regard to persons in the Internal Revenue Service, and the requirements under this Section are: (a) the granting of the application is discretionary with the Board; (b) the applicant must be engaged in the Internal Revenue Service of the United States at the time of the granting of the certificate, and must have passed grade number eleven as established in that Service prior to his making application for a certificate as a certified public accountant; (c) if such applicant complies with the other requirements of that Chapter; other requirements, of course, could only refer to such requirements as would not be inconsistent with this particular provision, which would take into consideration any fees, et cetera, that might be provided; and the last condition is that the applicant must be a resident of Florida as defined in Section 3917 on June 1, 1927. A resident of Florida is defined in said paragraph as:

"For the purpose of this chapter a resident of Florida is defined as one who has resided in Florida for at least twelve months immediately preceding his application."

From my examination of all subsequent statutes with relation to the State Board of Accountancy, I find nothing inconsistent with the second paragraph of Section 3922, supra.

I am of the opinion that the extension of time provided by Chapter 15637, Acts of 1931, related wholly to the first paragraph of Section 3922 since this was the only part of said paragraph that provided a time limit, and that when this extension was repealed by Chapter 17266, Acts of 1935, it, of course, did not affect the second paragraph of said section.

I, therefore, hold that any person presently engaged in the Internal Revenue Service of the United States Government and has passed grade number eleven as established by that service at the time of the passage of the Act, and who is a resident of the State of Florida as defined in Section 3917 on June 1, 1927, should be permitted to make an application for a certificate as a certified public accountant, and that the Board, in its discretion, could either grant or deny the same.

PUBLIC ACCOUNTANTS

June 14, 1941.—041-332.

APPLICANTS—C.P.A. EXAMINATION—CERTIFICATE

QUESTION: Does an applicant entitled to be granted a certificate to practice public accounting as a C.P.A. without an examination by the State Board, under Section 3922, Compiled General Laws of 1927—

PROFESSIONS AND VOCATIONS—Public Accountants

(a) Have to be an employee of the United States in such service, when the law was enacted?

(b) Have passed grade number eleven or could he obtain such grade at any time thereafter and up to the time of his application?

(c) If then a resident of Florida, should his residence in the State have been continuous since, or, could he have resided elsewhere since and, then, upon resuming residence in Florida, become an applicant?

*To Mr. Joseph Hartman, Secretary, State Board of Accountancy,
Jacksonville, Florida:*

(a) No, the applicant did not have to be an employee of the United States. See Section 3922, C. G. L. 1927.

(b) No, it was not necessary that he should have passed grade number eleven provided that he had passed such grade at the time of his application. See Section 3922, C. G. L.

(c) If the applicant was a resident of Florida on June 1, 1927, and had at that time been a resident as defined in Section 3917 of the Compiled General Laws, it would not be necessary for him to have been a continuous resident since, provided that upon resuming his residence in Florida he had all other qualifications. Again see Section 3922 of the Compiled General Laws of 1927.

PUBLIC ACCOUNTANTS

June 27, 1941.—041-363.

APPLICANTS—C.P.A.—REQUIREMENTS

QUESTION: Is a Revenue Agent with a grade 11 certificate who became a resident after June 1, 1927, and who has been a resident of Florida for more than six years, entitled to file an application with the State Board of Accountancy under Section 3922, C. G. L. 1927?

*To Mr. Joseph Hartman, Secretary, State Board of Accountancy,
Jacksonville, Florida:*

This question is answered by the following quotation from Section 3922, C. G. L.:

"... who is a resident of Florida as defined in Section 3917 on June 1, 1927."

Under the above quoted language of the statute, a Revenue Agent with a grade 11 certificate who became a resident after June 1, 1927, and who has been a resident of Florida for more than six years, would not be entitled to file an application with the State Board of Accountancy.

PUBLIC ACCOUNTANTS

June 1, 1942.—042-299.

BOARD OF ACCOUNTANCY—EXAMINATIONS—CERTIFICATES

QUESTION: (1) Has the State Board of Accountancy power and authority to grant waiver of examinations and certificates, as certified public accountants, to internal revenue agents of the United States who are residents of Florida and possess the grade required by Section 3922, Compiled General Laws, 1927?

PROFESSIONS AND VOCATIONS—Public Accountants

(2) Has the State Board of Accountancy power and authority to grant waiver of examinations and certificates, as certified public accountants, to persons who were granted authorizations to practice as "public accountants" under Section 3925, Compiled General Laws, 1927, instead of "certified public accountants" under Section 3922, Compiled General Laws, 1927?

(3) Is the annual registration fee collected by the State Board of Accountancy a license tax and if so is it of such nature as to preclude the levying of any other license tax by the state upon the accountant paying it?

To State Board of Accountancy, Hilderbrandt Building, Jacksonville, Florida:

(1) On May 13, 1941 this office rendered an opinion, which has been affirmed by opinions under dates of June 14 and August 4, 1941, wherein it was held that internal revenue agents of the United States who were residents of the State of Florida on June 1, 1927 may be certified as certified public accountants without examination. Under this opinion it was held that the applicant need not have been an employee of the Internal Revenue Department of the United States when the law was enacted; need not have passed grade eleven in the internal revenue service when the law was enacted, provided, they have subsequently passed said grade; however, said applicant must have been a resident of the state on said June 1, 1927.

If the facts as set up in Mr. R. T. Wilkie's letter to the Board, under date of April 16, 1942, a copy of which was furnished this office, are true then it seems that he was a citizen of the state on June 1, 1927; however, the matters set up in the letter are questions of fact which should be determined by the board from proof furnished by Mr. Wilkie and from such investigation as the board may deem necessary.

This opinion should be deemed applicable only to Mr. Wilkie and not upon the question generally.

(2) The State Board of Accountancy has no power or authority to grant waiver of examination and certificates as certified public accountants to persons who were granted authorizations to practice as a "public accountant" under Section 3925, Compiled General Laws, 1927, instead of "certified public accountants" under Section 3922, Compiled General Laws, 1927. The time has long since passed when the provisions for admission without examination were available to either resident or nonresident accountants (*Bourne vs. Pentland*, 143 Fla. 61, 196 So. 606, text 608).

This being true, I do not think that the board has any authority to grant a certificate without examination to G. Bland Leach to practice as a certified public accountant in this state, even granting that the facts set up in his letter to you under date of May 1, 1942 are true.

(3) The annual registration fee provided for in Section 8 of Chapter 15637, Laws of Florida, Acts of 1931, is for the purpose of regulating the profession and to pay the expenses of the administration of the accountancy act and not for the purpose of raising money for governmental purposes. The occupational license tax levied by Section 10, Chapter 18011, Laws of Florida, Acts of 1937 as amended by Chapter 20956, Laws of Florida, Acts of 1941, is a tax enacted for the purpose of raising revenue for governmental purposes. The registration fee is in addition to and not in lieu of the occupational license tax.

The annual registration fee collected by the State Board of Accountancy is not such a license tax as to preclude the levying of other license taxes upon the registered accountant.

PROFESSIONS AND VOCATIONS—Barbers

BARBERS

February 14, 1941.—041-74.

BARBERS' SANITARY COMMISSION—EXAMINATION—RENEWAL OF CERTIFICATE

QUESTION: (1) Are those barbers who held a permit under the Acts of 1931 and have not yet had an examination entitled to an examination without new application for registration under the Acts of 1939, assuming that the applicant duly filed his application and that the required fee was paid and that the applicant has not been called for examination?

(2) Is a barber who held a certificate of registration under the Acts of 1931 and who has allowed his certificate to lapse for more than five years, eligible to renew his certificate by paying the restoration fee under the provisions of the 1939 Act?

To Barbers' Sanitary Commission:

(1) I call your attention to the fact that Chapter 19183, Acts of 1939, expressly repeals Chapter 14650, Acts of 1931. You will note, however, from a reading of the two Acts that although the 1939 Act expressly repeals the 1931 Act it re-enacts and re-adopts substantially the provisions of the 1931 Act with certain amendments. I call your attention to the well settled rule of law that when a repealing act re-enacts substantially the provisions of the act repealed, the latter is construed not to be thereby destroyed or interrupted in its operation. (*Forbes vs. The Board of Health of Escambia County*, 9 So. 446).

"It seems, indeed, to be the general understanding that the re-enactment of an earlier statute is a *continuance not a repeal of the latter*, even though the latter act expressly repeals the earlier."

(Endlich on the Interpretation of Statutes, Section 490. Emphasis supplied).

Therefore any person who duly filed his application, together with the required fee, under the provisions of the 1931 Act, and who has not been called for examination, is not required to file another application nor to pay an additional fee in order to be entitled to an examination under the 1939 Act.

(2) I call your attention to Sec. 12 of Chapter 19183, Acts of 1939. You will observe that the section relates to resident practicing barbers. The intent of this section is that resident practicing barbers who have a certificate of registration under the 1931 Act, the certificate of registration not having lapsed or having lapsed for not more than five years, shall be entitled to a certificate of registration under the present Act upon payment of the required fee.

I call your attention to Section 14 of Chapter 19183, *supra*, which relates to renewals and restoration of certificate of registration. The intent of this Section is that barbers who have not let their certificate of registration lapse for more than five years are entitled to renew their certificate of registration upon payment of the restoration fee.

It is my opinion therefore, that a barber who has permitted his certificate to lapse for more than five years is not entitled to a renewal of his certificate by paying the restoration fee under the provisions of the 1939 Act.

PROFESSIONS AND VOCATIONS—Beauty Culture Law**BEAUTY CULTURE LAW**

September 23, 1942.—042-465.

BEAUTY COLLEGE—BOND OF OPERATOR

QUESTION: Does a bond of an operator of a beauty college, made under the provisions of Section 477.09, sub-section (7), Florida Statutes 1941, sufficiently comply with this section which provides: "... every such bond shall continue in full force and effect for the lifetime of the school . . .," when such bond provides that the same may be cancelled by the surety thereon upon thirty days notice in writing?

To Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture Examiners, Tampa, Florida:

An examination of the bond enclosed in your letter discloses that it substantially complies with the provisions of Section 477.09, sub-section (7), Florida Statutes 1941, which is the provision of law applicable thereto, with one exception. Section 477.09, sub-section (7), *supra*, provides that "... every such bond shall continue in full force and effect for the lifetime of the school . . .", and the last paragraph of the enclosed bond provides that the same may be cancelled upon thirty days' notice in writing, etc. However, I do not think this a material objection, for the reason that this paragraph in the bond allows sufficient time after notice is given for the State Board of Beauty Culture Examiners to require a new bond, since this cancellation privilege does not cancel any liability under the bond by the surety which may originally have accrued, and such liability would be enforceable against the surety notwithstanding a cancellation.

Although it does not affect the sufficiency of the bond itself, I think it proper to require that bonds executed on behalf of a surety company by an attorney-in-fact, such as the enclosed bond, should have attached thereto a proper authorization disclosing the authority of such attorney-in-fact to execute such bond.

As it is the duty of the State Board of Beauty Culture Examiners to approve all bonds such as the one enclosed, I think it prudent that the board inquire from the State Treasurer, as Insurance Commissioner, whether or not the surety company making the bond is qualified to do business in the State of Florida and has obtained from said Insurance Commissioner a certificate of authority.

I am, therefore, of the opinion that the bond for the operator of the Colson Beauty College, Lakeland, Florida, enclosed in your letter of September 16, 1942, and herewith returned to you, is substantially in accordance with the provisions of Section 477.09, sub-section (7), Florida Statutes 1941, and that it is a sufficient bond for the purpose for which it is intended.

BEAUTY CULTURE LAW

September 23, 1942.—042-460.

BEAUTY SHOPS—RIGHT TO ENGAGE IN HAIRCUTTING OF SOLDIERS

QUESTION: A large army replacement center is located at Miami Beach, Florida, and several of the beauty shops are asking for permission to engage in haircutting for soldiers in their shops, this work to be done only after the shops have finished their beauty work for the day. Can this work be done under the provisions of the Florida Beauty Culture Law?

PROFESSIONS AND VOCATIONS—Beauty Culture Law

To Miss Eva A. Louthier, Vice President, State Board of Beauty Culture Examiners:

Section 477.03, Florida Statutes 1941, defining "Beauty Culture," "Beauty Shop," etc., in sub-section (a) of Section (1), reads as follows: "Cutting or bobbing the hair." This provision permits licensed beauty shops to cut or bob hair without any limitation as to whether the work is performed upon a man or woman, soldier or civilian.

In view of the fact that the cutting of men's hair is usually performed in a barber shop, I would call your attention to Section 476.04, Florida Statutes 1941, which exempts certain persons from the provisions of the Florida Barber Law. Sub-section (4) of this section reads as follows: "Persons practicing beauty culture." Under this provision of law, beauty shops are exempt from the provisions of the Florida Barber Law.

I am of the opinion that licensed beauty shops have the right, under the laws of this State, to engage in the work of haircutting of soldiers in their shops, whether this work be done after the shops are through with their beauty work for the day, or whether it is done during regular hours, provided such beauty shops comply with the rules and regulations of the State Board of Beauty Culture Examiners.

BEAUTY CULTURE LAW

October 23, 1942.—042-499.

BOARD OF EXAMINERS—EXECUTIVE OFFICE—LOCATION

QUESTION: The official executive office of the State Board of Beauty Culture Examiners is at this time established and maintained in Tampa, Florida, and it has become necessary for this office to be moved from the building it now occupies. At what place, i.e., city or town, within the State of Florida, should or could the executive office of the State Board of Culture Examiners be legally established and maintained?

To Miss Ethel Manning, Executive Secretary, State Board of Beauty Culture Examiners, Tampa, Florida:

Sub-section 1 of Section 477.20, Florida Statutes, 1941, provides as follows:

"An office shall be maintained in Tallahassee, Florida, at its own expense, but this requirement shall not be construed to prevent the board from maintaining other offices in some other cities within the state if, the opinion of the board, such other offices are necessary in order for the board to perform its duties in a more efficient manner, provided, however, that not more than one of such offices shall be maintained in each of said districts established by this chapter, exclusive of said office to be maintained at Tallahassee." (Italics supplied.)

Sub-section 3 of Section 477.20, *supra*, provides as follows:

"One of said employees shall be an executive secretary who shall devote full time to the conduct and supervision of said offices at Tallahassee and whose salary shall not exceed one hundred seventy-five dollars per month."

Sub-section 1 of Section 477.21, *supra*, provides as follows:

"All moneys received by the board under this chapter shall be paid to the executive secretary at Tallahassee, . . ."

PROFESSIONS AND VOCATIONS—Beauty Culture Law

It appears from the above quoted provisions of the Florida Beauty Culture Law and from reading this law in its entirety that it intends to make it mandatory upon the State Board of Beauty Culture Examiners to establish and maintain an official executive office in the city of Tallahassee, Florida, under the supervision of a full time executive secretary and to allow the Board in their discretion to establish and maintain additional offices as branch or district offices in other places within the State, not to exceed one of such offices in each district as defined by Section 477.19, Florida Statutes, 1941, exclusive of the official executive office at Tallahassee, Florida. Throughout the Florida Beauty Culture Law there appear provisions of law fixing the functions, powers, and duties of the State Board of Beauty Culture Examiners and their executive secretary to be performed in Tallahassee and from this together with the express provision contained in Sub-section 1 of Section 477.20, supra, that an office shall be maintained in Tallahassee, Florida, it clearly appears that the law intended that the official executive office of the Board should be established and maintained at Tallahassee.

I am, therefore, of the opinion that it is mandatory upon the State Board of Beauty Culture Examiners to establish and maintain an official executive office in the city of Tallahassee, Florida, and that this office can not legally be established or maintained at any other place in the State and that the Board may in its discretion establish such other branch or district offices as it may determine to be necessary, not to exceed, however, one of such offices in each district of the State as defined by Section 477.19, supra, exclusive of the official executive office in Tallahassee.

BEAUTY CULTURE LAW

September 24, 1942.—042-462.

JUNIOR OPERATOR—EDUCATIONAL REQUIREMENTS FOR EXAMINATION AND CERTIFICATE

QUESTION: Is an applicant for examination and certificate of registration as Junior Operator qualified to take this examination in view of the fact that she completed her course of beauty culture training more than four years prior to filing application?

To Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture Examiners:

Section 477.07, Florida Statutes 1941, sets forth the qualifications required of persons to receive a certificate of registration as a registered junior operator and sub-section (4) of this section, which is applicable, reads as follows: "who has graduated from a school of beauty culture approved by the Board."

This provision does not fix any period of time within which an applicant must file application for examination after having completed such educational requirements. I am aware of no other provisions of law applicable to this particular requirement.

I am, therefore, of the opinion that if the school of beauty culture from which the applicant graduated was approved by the State Board of Beauty Culture Examiners at the time the applicant attended such school and graduated therefrom, she is entitled to take this examination, provided she possesses all other qualifications and has met all other requirements as provided by law.

PROFESSIONS AND VOCATIONS—Beauty Culture Law
BEAUTY CULTURE LAW

October 15, 1942.—042-492.

NON-RESIDENT BEAUTICIAN—PERMIT TO PRACTICE

QUESTION: Can the State Board of Beauty Culture Examiners legally issue a permit to a non-resident beautician to practice beauty culture as a beautician in the State of Florida, where such non-resident beautician has made application to take the examination for a certificate to practice in this state as a registered beautician and has paid the qualification fee for such examination?

To Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture Examiners, Tampa, Florida:

Section 477.12, Florida Statutes 1941, fixes the prerequisites and qualifications of non-resident applicants for certificates of registration to practice as registered beauticians in this state, and this section specifically provides as follows:

"... shall, upon payment of the required fee, be issued a permit to practice as a *junior operator beautician only* until he is called by the Board for examination to determine his fitness to receive a certificate of registration to practice beauty culture. Should he fail to pass the required examination, he may be allowed to *practice as a junior operator beautician only* until he is called by the Board for the next term examinations. Should he fail to pass the second examination, he must cease to practice beauty culture in this State until such time as said person qualifies by passing such examination." (Italics ours.)

Section 477.12, supra, is the only provision of law applicable to the issuance of permits to non-resident beauticians, and this section specifically limits the issuance of such permits to "practice as a junior operator beautician only," thereby excluding the issuance of permits to practice as registered beauticians. The language of this law is clear, and it appears that its purpose in limiting such permits to junior operator beauticians was to prevent anyone from practicing independently as a registered beautician in this State until they had passed the examination, and require them to practice under the immediate personal supervision of a registered beautician, licensed in this State, as provided by Section 477.07, Florida Statutes 1941.

It appears from Chapter 477, Florida Statutes 1941, that a junior operator beautician is, in effect, an apprentice beautician who is licensed and permitted only to practice beauty culture under the immediate personal supervision of a registered beautician licensed to practice in this State.

I am, therefore, of the opinion that the State Board of Beauty Culture Examiners can legally issue a permit to a non-resident beautician to practice beauty culture in the State of Florida as a junior operator beautician, where such non-resident beautician has made application to take the examination as required by Chapter 477, Florida Statutes 1941, but that the Board cannot legally issue a permit to such non-resident beautician to practice beauty culture in this State independently as a registered beautician during the interim that such application is pending.

BEAUTY CULTURE LAW

August 27, 1942.—042-420.

TEACHERS—CERTIFICATE OF REGISTRATION

QUESTION: The examination given by the State Board of Beauty Culture Examiners to an applicant for a certificate of registration as a

PROFESSIONS AND VOCATIONS—Beauty Culture Law

teacher of beauty culture is inclusive of subjects upon which an applicant for a certificate of registration to practice beauty culture as a beautician is examined and, in addition thereto, such examination comprehends the methods of teaching beauty culture.

When the State Board of Beauty Culture Examiners has given an examination to one seeking to be licensed as a teacher of beauty culture and such applicant has been passed by the Board, and thereafter such teacher of beauty culture desires to practice as a beautician in the State of Florida, should the Board require such teacher to submit to, and pay the fee for, the examination ordinarily given to those seeking a license as a beautician, or should the Board, upon the payment by the teacher to the Board of the sum of \$3.50 (the renewal fee for a beautician's certificate) issue to such teacher a certificate to practice as a beautician in the State of Florida?

To Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture Examiners, P.O. Box 1651, Tampa, Florida:

Under the provisions of Section 477.17, Florida Statutes, 1941, the fee to be paid for an examination to determine the qualifications of an applicant to teach beauty culture is the sum of \$45.00. A fee of \$35.00 is prescribed for an examination to determine the qualifications of an applicant to practice beauty culture as a beautician. The fee prescribed for the issuance of a certificate of registration to practice beauty culture as a beautician is the sum of \$5.00.

A statute should be so construed that the operation and administration thereof will not produce absurd consequences, and will not perpetrate an injustice upon those affected.

If an applicant for a certificate of registration as a teacher of beauty culture is examined upon the same subjects upon which one seeking a certificate of registration to practice beauty culture as a beautician is examined and such person is given, in addition thereto, an examination in the theory and practice of teaching beauty culture, and passes such examination, it is my opinion that such person would be entitled to receive from your Board, upon the payment to it of the fee of \$5.00, a certificate of registration as a teacher of beauty culture and, also, upon the payment of an additional fee of \$5.00, such person would be entitled to receive a certificate of registration to practice beauty culture as a beautician.

BEAUTY CULTURE LAW

October 21, 1941.—041-602.

WORLD WAR VETERANS—REGISTRATION FEES—EXEMPTION

QUESTION: Under Section 1269, C.G.L. Perm. Supp. are World War Veterans exempt from payment of registration fees required by Chapter 20,333, Acts of 1941?

To Hon. Jos. S. White, Attorney at Law, West Palm Beach, Florida:

The question must be answered in the negative.

Occupational taxes or licenses are enumerated and set forth in the general statutes and are assessed and collected for general State and County governmental purposes.

Chapter 16800, Acts of 1935, as amended by Chapter 20333, Acts of 1941, relates to the State Board of Beauty Culture Examiners.

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Section 17, as amended, provides for the issuance of certain certificates of registration by the State Board of Beauty Culture Examiners to applicants upon payment of certain fees therefor.

Section 22, as amended, provides for the employment of such inspectors, clerks, etc., as are necessary to carry out the provisions of the Act.

Section 23, as amended, appropriates all moneys received by the Board under the Act for the payment of all necessary and proper expenses in carrying out the provisions of said Act. It, therefore, appears that such registration fees are not in the nature of occupational licenses but are in the nature of fees required for the administration of the Florida Beauty Culture Law. I find no exemption to World War Veterans among the Florida Beauty Culture Statutes.

Your attention is also directed to Section 35, Chapter 18011, Acts of 1937, as amended by Chapter 20956, Acts of 1941, wherein it is provided:

"Fees or licenses paid to any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes shall be in addition to and not in lieu of any occupation license tax required by this Act or other law unless otherwise expressly provided by law."

The above Section is a part of the occupational license statutes and directly supports the foregoing opinion.

OUTDOOR ADVERTISERS

July 9, 1941.—041-372.

LICENSE FEES—COLLECTION

QUESTION: Pursuant to the provisions of Section 4 of Chapter 20446, Acts of 1941, would the State Road Department be authorized to delegate to county tax collectors authority to collect license fee of \$15.00 per annum for the use of the county?

Hon. Thomas A. Johnson, Chairman, State Road Department:

Chapter 20446, Laws of Florida, Acts of 1941 relating to regulation of outdoor advertising and providing for the licensing of persons engaged in the business of outdoor advertising provides in Section 4 in part as follows:

"No person shall engage or continue in the business of outdoor advertising in this State outside of the corporate limits of any city or town without first obtaining a license therefor from the State Chairman."

(State Chairman is defined in sub-division D of Section 1 of this law to mean the chairman of the State Road Department.)

"... The fee for such license, hereby imposed for revenue for the use of the State, shall be Seventy-Five Dollars per annum for persons or corporations operating under this Act in one to eight counties and Two Hundred Dollars per annum for those operating in more than eight counties, payable in advance, and Fifteen Dollars per annum, payable annually in advance for the use of the county, in each and every county within the State in which licensee shall engage or continue in the business of outdoor advertising."

It is further provided in Section 2 of said law as follows:

"It shall be the function and duty of the State Chairman to administer and enforce the provisions of this Act. He may, in the performance

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of his duties hereunder, assign to division engineers, and other employees in his department such duties as he may prescribe."

It appears therefore that all licenses to engage or continue in the business of outdoor advertising must be obtained from the State Chairman and while the State Chairman has authority to administer and enforce the provisions of this law, an assignment of his duties may only be made to the employees of his department. Tax collectors are independent county officers and the chairman of the State Road Department would not have authority to designate and prescribe duties for county tax collectors. It further appears that it was the legislative intent to simplify the collection of license moneys by delegating the collection to the State Chairman and not to every tax collector in the State.

It is therefore my opinion that the \$15.00 annual license fee for the use of the county must be paid to the State Chairman.

OUTDOOR ADVERTISERS

February 26, 1942.—042-100.

LICENSE FEES—DISPOSITION

QUESTION: Chapter 20446, Acts of 1941 Legislature, provides for the licensing of outdoor advertising along the state highways of Florida. Should the Comptroller send to the county the \$15.00 collected by the State Road Department in a county to that county or should this money be held by the State Road Department and used by the State Road Department for the construction and maintenance of roads within that county or could this \$15.00 collected in the county be placed in one General Fund for the construction and maintenance of roads in all of the counties of the State?

To Hon. J. M. Lee, Comptroller:

You should not send to the county the \$15.00 collected by the State Road Department in a county to that county but such money should be held in the State Treasury and allocated to the State Road Department and used by the State Road Department for the construction and maintenance of roads within that county. I have come to this conclusion after a careful analysis of Chapter 20446, Acts of 1941 Legislature and other acts with regard to occupational license taxes.

Section 2 of Chapter 20446 provides that the law should be administered by the Chairman of the State Road Department.

Section 4 provides in part:

"The fee for such license hereby imposed for revenue for the use of the State shall be \$75.00 per annum for persons or corporations operating under this act in one to eight counties, and \$200.00 per annum for those operating in more than eight counties, payable in advance, and \$15.00 per annum payable annually in advance for the use of the county in each and every county within the State in which licensee was engaged or continued in the business of outdoor advertising, as aforesaid."

It is further provided, in the same section:

"The State Chairman shall have authority, after thirty days notice in writing to licensee, to revoke any license granted by him upon *repayment of a proportionate part of the license fee* in any case where he shall find that any material information required to be given in the application for license is knowingly false or misleading or that licensee has violated any of the provisions of this act."

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Unless the Chairman of the State Road Department had full control over all monies collected under the provisions of this act, at all times, he could not refund the proportionate part of the license fee when he revoked the permit if the \$15.00 collected for the use of the county had been remitted to the county. Apparently it was the intention of the Legislature that the Chairman of the State Road Department should have control of all monies collected under the act and that the money collected for a particular county should be used in the construction and maintenance of roads in such county. If the money could go into one General Fund for the construction and maintenance of roads in all the counties of the State it would have been useless to have separated the amount charged for a state license and the amount charged for the county's part of same. In other words the Legislature could have fixed a lump sum for the license.

Section 12 specifically provides for the disposition of all fees. I quote the same:

"All monies received by the Chairman under the provisions of this act shall be paid by him to the State Treasury and allocated to the State Road Department for use in the administration of this act and in the construction and maintenance of roads."

It therefore seems to me that when we have read the pertinent parts of the act we must come to the conclusion that all monies received under the provisions of the act should be deposited in the State Treasury and that the \$15.00 collected for the use of the county in each and every county in which the licensee is engaged in business, shall be spent by the State Road Department in the construction and maintenance of roads in the particular counties from which the \$15.00 is paid by the licensee for permission to engage in business in such county.

The Act (Chapter 20446) in Section 4, among other things, provides:

"Applications for license . . . shall be accompanied by the annual fee."

This \$15.00 is undoubtedly a part of such fee, and is to be administered by the Chairman of the Road Department for the use of the County where collected, as above stated.

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February 11, 1942.—042-76.

POLITICAL POSTERS—ADVERTISING SIGNS

QUESTION: Under the provisions of Chapter 20446, Laws of Florida 1941 is a candidate for public office in this State who constructs, erects, operates, uses or maintains or causes or permits to be constructed, erected, operated, used or maintained any form of advertisement—particularly a placard or a poster—outside of the corporate limits of a city or an incorporated town in sight of a public highway, advertising that he is a candidate for office, required to obtain a permit so to do?

Hon. Thomas A. Johnson, Chairman, State Road Department:

Section 1 (a) of this Act defines an "Advertisement" as follows:

"'Advertisement' means any writing, printing, picture, painting, display, emblem, drawing, sign, or similar device intended to invite or to draw the attention of the public to any goods, merchandise, property, real or personal, business services, entertainment or amusement, manufactured, produced, bought, sold, conducted, furnished or dealt in by any

PROFESSIONS AND VOCATIONS—Outdoor Advertisers

person which is posted, painted, tacked, nailed or otherwise displayed outdoors on real property, and includes any part of an advertisement recognizable as such."

Section 1 (b) defines an "Advertising structure" in the following language:

"'Advertising structure' means any structure erected for advertising purposes, with or without any advertisement displayed thereon, situated upon or attached to real property outdoors, upon which any poster, bill, printing, painting, device or other advertisement of any kind whatsoever may be placed, posted, painted, tacked, nailed or otherwise fastened, affixed or displayed."

And an "Advertising sign" is defined by Section 1 (c) as follows:

"'Advertising sign' means any card, cloth, paper, metal painted or wooden sign or any character, posted, stuck, glued, tacked, painted or otherwise fastened or affixed to or upon any fence, post, tree, wall or thing other than an advertising structure."

I seriously doubt that a political poster would come within the definition of the word "Advertisement," as it does not invite or draw the attention of the public to any goods, merchandise, property, business services, entertainment, or amusement.

Neither would such a poster come within the definition of an "Advertising structure." Such a poster is, however, in my opinion, an "Advertising sign" within the meaning of this Act.

The language used in Section 1 (c) of the Act in defining "Advertising sign" is all inclusive and was clearly intended to cover all types of signs, posters and billboards that were not strictly "advertisements" within the meaning of Section 1 (a) of the Act.

It seems to me that any other construction would lead to an absurdity, as political posters erected and maintained along the highways can and would constitute traffic hazards and detract from the scenic beauty of the country in the same manner and to the same extent as signs advertising products for sale, such as were before the Supreme Court of Florida in the Hav-A-Tampa and Swisher cases.

As stated by the Supreme Court of Florida in the case of Haworth vs. Chapman, 152 So. 663:

"There is a strong presumption against absurdity in a statutory provision; it being unreasonable to suppose that the Legislature intended their own stultification, so, when the language used is susceptible of two senses, the sense will be adopted which will not lead to absurd consequences."

It is therefore my opinion that political posters or placards placed adjacent to or in sight of a public highway in the State of Florida are "Advertising signs" within the meaning of the Florida Outdoor Advertising Law (Chapter 20446, Acts of 1941), and are subject to the provisions of this Act.

OUTDOOR ADVERTISERS

January 29, 1942.—042-47.

SERIAL ADVERTISEMENTS—PERMITS AND FEES

QUESTION: The Burma-Vita Company has filed with the State Road Department applications for 89 Outdoor Advertising Permits. Each

PROFESSIONS AND VOCATIONS—Outdoor Advertisers

of the proposed advertisements consists of a series of six boards, placed along the highway approximately 90 to 100 feet apart, on each of which is one line of printed or written matter, and all six constituting a rhymed jingle with the word "Burma-Shave" appearing on the last board. The product intended to be advertised is "Burma-Shave," a preparation used in shaving. Should each of the six boards be considered as constituting a separate advertisement or should the combination of the six boards be considered as one advertisement?

To State Road Department:

Section 1 (a) of Chapter 20446, Laws of Florida, Acts of 1941, defines "Advertisement" within the meaning of this Act as follows:

"'Advertisement' means any writing, printing, picture, painting, display, emblem, drawing, sign, or similar device intended to invite or to draw the attention of the public to any goods, merchandise, property, real or personal, business services, entertainment or amusement, manufactured, produced, bought, sold, conducted, furnished or dealt in by any person which is posted, painted, tacked, nailed or otherwise displayed outdoors on real property, and includes any part of an advertisement recognizable as such."

Each of these signs or boards are intended by the advertiser to invite and attract public attention to its advertised product "Burma-Shave," and by the manner of display each of them is recognizable as a part of an advertisement within the meaning of the above quoted section of Chapter 20446, Acts of 1941. The Legislature saw fit to define in this Act the term "Advertisement," and a statutory definition so declared takes precedence over all other definitions.

Greenleaf & Crosby Company vs. Coleman, 158 So. 421.

The contention is made by the Burma-Vita Company that inasmuch as only the last board of each of these series of signs contains the word "Burma-Shave" none of the boards, except this one, advertises anything and, therefore, only one permit fee should be charged for each of the series.

I cannot follow this reasoning, as such a construction of the Act would entirely defeat the permit provisions thereof. If it is necessary that the name of the advertised product, or the name of the advertiser, appear on the display in order to constitute an "Advertisement," then any of a large number of well known products could be advertised by means of billboards or signboards along the highways by merely writing or printing their advertising slogan or emblem thereon and leaving off entirely the name of the product and the advertiser, and no permit fee could be charged. For example, it is well known that a certain coffee is sometimes advertised by displaying on a billboard a coffee cup turned upside down with a single drop of coffee dripping from it, under which usually appear the words "Good to the last drop." As this is a well-known advertising display and slogan, it would just as effectually advertise the product without carrying the name of the coffee or the advertiser, and no permit fee could be charged. The same would be true as to a certain brand of cigarettes which has adopted the slogan "They Satisfy," as well as a large number of other well advertised products.

Further, to hold that an "Advertisement" within the meaning of this Act can consist of six separate signboards placed 90 to 100 feet apart, then using the same system of display an advertiser could place signboards a mile apart for a total distance of 100 miles without having to pay but one advertising permit fee, which, of course, would be absurd.

It is therefore my opinion, that each of the six signs or boards of the series constitutes a separate advertisement for which a separate application must be made and a separate permit fee paid.

CHAPTER XXV

REGULATIONS OF TRADE, COMMERCE AND INVESTMENTS

FOOD, DRUGS AND COSMETICS

March 19, 1941.—041-148.

COMMERCIALLY MANUFACTURED PRODUCTS—SALE AS "HOME MADE" OR "HOMADE" PRODUCTS

QUESTION: May commercially manufactured products be legally sold as "Home Made" or "Homade" products?

To Hon. Nathan Mayo, Commissioner of Agriculture:

Chapter 19656, Acts of Florida, 1939 (C.G.L. Perm. Supp. 1940 Parts, Section 4151 (664), et seq.) generally known as the Florida Food, Drug and Cosmetic Act, provides as follows:

"Section 1 (b). This Act is intended

"(2) to provide legislation which shall be uniform, as provided in this Act, and administered so far as practicable in conformity with the provisions of and regulations issued under the authority of the Federal Food, Drug and Cosmetic Act; and likewise uniform with the Federal Trade Commission Act, to the extent it expressly prohibits the false advertisement of food, drugs, devices and cosmetics; and"

"Section 2. For the purpose of this Act—(k). If an article is alleged to be misbranded because the labeling is misleading, or if an advertisement is alleged to be false because it is misleading, then in determining whether the labeling or advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or in any combination thereof, but also the extent to which the labeling or advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling or advertisement relates under the conditions of use prescribed in the labeling or advertisement thereof or under such conditions of use as are customary or usual."

"Section 3. The following acts and the causing thereof within the State of Florida are hereby prohibited:

"(a) The manufacture, sale or delivery, holding or offering for sale of any food, drug, device, or cosmetic that is adulterated or misbranded.

"(b) The adulteration or misbranding of any food, drug, device, or cosmetic.

"(c) The receipt in commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

"(e) The dissemination of any false advertisement."

"Section 11. A food shall be deemed to be misbranded—

"(a) If its labeling is false or misleading in any particular."

**REGULATIONS OF TRADE, COMMERCE AND INVESTMENTS—
Food, Drugs and Cosmetics**

"Section 15. A drug or device shall be deemed to be misbranded—

"(a) If its labeling is false or misleading in any particular."

"Section 18. A cosmetic shall be deemed to be misbranded—

"(a) If its labeling is false or misleading in any particular."

"Section 19. (a) An advertisement of a food, drug, device, or cosmetic shall be deemed to be false if it is false or misleading in any particular."

Chapter 16047, Acts of Florida, 1933 (3218 et seq. Perm. Supp.) generally known as the Florida Frozen Desserts Law, provides:

"Section 7. PROHIBITION AS TO SALE.

"(b) No person shall sell, offer for sale or advertise for sale any frozen dessert, if the brand name of the frozen dessert or label upon it or the advertising accompanying it shall give a false indication of origin, character, composition, or name of manufacturer, or is otherwise false or misleading in any particular."

Reading the foregoing statutory provisions, it is very evident that the legislature intended to prohibit and declare as unlawful any representation or misrepresentation made to the public which would mislead or cause an erroneous impression or belief as to the origin, manufacture, ingredients, qualities, etc., of any commercially manufactured products covered by the provisions of said acts.

In commercial terms a word is usually used either to identify or describe a certain item and unless the word is one with peculiar significance or meaning to the manufacturers or dealers, the simplest and most understandable meaning is the one normally sought to be conveyed and understood by the public at large.

In *Electric Reduction Co. vs. Lewellyn*, 11 Fed. 2d 493, 494, the Court defined a word as the "skin of a living thought."

In *Hall vs. U. S.*, 267 Fed. 795, the Court said:

"Language used in the label is to be given the meaning ordinarily conveyed by it to those to whom it was addressed."

In *U. S. vs. 150 cases of Fruit Pudding*, 211 Fed. 360, a proceeding for the misbranding of fruit in violation of the Pure Food and Drugs Act, the court held:

"The words of the offending label are to be construed in their ordinary or customary meaning so far as they have one."

In *Libby, McNeil & Libby vs. U. S.*, 210 Fed. 148, the Court held:

"Where words in every day use are found on the label of a food product, they are to be given their ordinary and popular meaning, rather than the commercial meaning which they have acquired among manufacturers and dealers."

The word "Home Made" has but one legal, natural, popular, generally accepted and understood meaning which is:

"Made at home; of domestic manufacture."

See 29 *Corpus Juris*, 769; *Webster's New International Dictionary*; *Webster's Twentieth-Century Dictionary*.

I have been unable to find any judicial definition of "Homemade." Neither does this word appear in the recognized English Dictionaries considered

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as authorities on English words. Its use may have been adopted as a trade name—an abbreviation or contraction of the two words "Home Made"—its unique form and spelling being designed to attract and interest the public eye and attention. When read in print or heard by word of mouth "Homade" conveys the same idea and thought, and is only understood by the general public as "Home Made," which is "made at home; of domestic manufacture."

It is therefore my opinion that the use of the words "Home Made" or "Homade" in connection with the sale of commercially manufactured products are calculated to induce prospective customers to purchase the product believing it to be actually of domestic manufacture, and is misleading and constitutes a misbranding and gives a false indication of origin, character and composition of a product commercially manufactured; and that said words "Home Made" and "Homade," cannot be used in connection with the sale of any commercially manufactured products within the purview of Chapter 19656, Acts of Florida, 1939, and Chapter 16047, Acts of Florida, 1933. To do so would be in direct contravention and violation of the law.

The Florida Food, Drug and Cosmetic Act and Florida Frozen Deserts Law were designed and enacted to work hand in hand with the Federal Food, Drug and Cosmetic Act, as well as the Federal Trade Commission Act, in an effort to prevent and prohibit false advertising of food, drugs, devices and cosmetics.

This opinion is parallel and conforms to the recent Federal Trade Commission order issued against a Massachusetts firm—to seize and desist from representing factory made food products as home made or home cooked unless they are in fact made and cooked in the manner and of the ingredients characteristic of the preparation of such products in the home, for consumption in the home, as distinguished from factory made products.

FOOD, DRUGS AND COSMETICS

October 16, 1941.—041-598.

DANGEROUS DRUGS—PRESCRIPTION AND SALE

QUESTION: Under Chapter 19656, Acts of 1939, may druggists legally fill prescriptions for "dangerous drugs," or other types of restricted drugs, when the prescriptions are signed by doctors licensed to practice the healing art other than medical doctors, dentists or veterinarians?

To Hon. Nathan Mayo, Commissioner of Agriculture:

Section 15 (k) of the Florida Food, Drug and Cosmetic Act reads in part as follows:

"A drug or device shall be deemed to be misbranded:

"(k) If it is a drug sold at retail for use by man, and contains any quantity of aminopyrine, barbituric acid, cinchophen, dinitrophenol, or sulfanilamide; unless it is sold on a written prescription signed by a member of the medical, dental or veterinary profession who is licensed by law to administer such drug, and its label bears the name and place of business of the seller, the serial number and date of such prescription, and the name of such member of the medical, dental or veterinary profession."

The term "medical profession" is broad enough to include everyone practicing any branch of the healing art regardless of the school of medi-

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cine to which he belongs. However, the quoted provision of the Florida Food, Drug and Cosmetic Law further limits the prescription of "dangerous drugs" to such members of the medical profession who are licensed by law to administer such drugs.

All drugs enumerated in the above provision are contained in *Materia Medica* and are drugs taken internally.

Osteopaths are members of the medical profession, broadly speaking, and are permitted by statute to use all drugs except those not taught in the standard colleges or schools of osteopathy. If the foregoing drugs, known as "dangerous drugs," are taught in the standard colleges or schools of osteopathy, they may be prescribed by osteopaths, otherwise not.

Medical doctors licensed by the State Board of Medical Examiners are the only members of the medical profession in this state licensed by law who are authorized to prescribe all drugs included in *Materia Medica*.

It is therefore my opinion that druggists may legally fill prescriptions for the enumerated drugs when the prescriptions are signed by medical doctors licensed by the State Board of Medical Examiners; or when prescribed by osteopaths, if such drugs are taught in the standard colleges or schools of osteopathy.

FOOD, DRUGS AND COSMETICS

January 15, 1942.—042-24.

DANGEROUS DRUGS—PRESCRIPTION AND SALE

QUESTION: May naturopaths, chiropractors and other practitioners of the healing art prescribe "dangerous drugs" as mentioned in Section 15 (k) of the Florida Food, Drug and Cosmetic Act?

To Hon. Nathan Mayo, Commissioner of Agriculture:

Supplement to opinion 041-598, dated October 16, 1941.

The above cited section limits the right to prescribe such drugs to members of the medical, dental or veterinary profession who are licensed by law to administer such drugs. While the term "medical profession" is sufficiently broad to cover all branches of the healing art, nevertheless, with the possible exception of osteopaths, as pointed out in my former opinion, only medical doctors licensed by the State Board of Medical Examiners are permitted in this State to practice *Materia Medica*, and since the "dangerous drugs" enumerated in Section 15 (k), *supra*, are all contained in *Materia Medica*, and are drugs taken internally, it is my opinion that druggists may legally fill prescriptions for the enumerated drugs only when the prescriptions therefor are signed by medical doctors licensed by the State Board of Medical Examiners, or when prescribed by osteopaths if such drugs are taught in the standard colleges or schools of osteopathy, and, of course, by members of the dental or veterinary profession licensed by law to administer such drugs.

FOOD, DRUGS AND COSMETICS

March 9, 1942.—042-120.

DRUGS—NURSES' RIGHT TO DISPENSE

QUESTION: Are trained nurses authorized to dispense those drugs enumerated in Section 15 (k) of the Florida Food, Drug and Cosmetic Act from hospital stocks?

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Food, Drugs and Cosmetics**

To Hon. Nathan Mayo, Commissioner of Agriculture:

Section 15 of the Florida Food, Drug and Cosmetic Law provides that a drug shall be deemed to be misbranded:

"(k) If it is a drug sold at retail for use by man, and contains any quantity of aminopyrine, barbituric acid, cinchophen, dinitrophenol, or sulfanilimide; unless it is sold on a written prescription signed by a member of the medical, dental or veterinary profession who is licensed by law to administer such drug, and its label bears the name and place of business of the seller, the serial number and date of such prescription, and the name of such member of the medical, dental or veterinary profession."

Further, the Florida Food, Drug and Cosmetic Law specifically prohibits the misbranding of any drug, and also the manufacture, sale or delivery, holding or offering for sale, of any drug that is misbranded.

Therefore, before any of the drugs mentioned in Section 15 (k), supra, can be sold or delivered, it must be sold or delivered on a written prescription therefor, signed by a member of the medical, dental or veterinary profession who is licensed by law to administer such drug, and its label must bear the name and place of business of the seller, the serial number and date of such prescription, and the name of the physician prescribing the same.

Section 3527, Compiled General Laws of Florida—the Pharmacists' Law—provides that:

"Any person not registered by said Board (the Board of Pharmacy of the State of Florida) who shall prepare or dispense a medical prescription or a physician's prescription, or dispense, give or sell at retail medicines or poisons, except under the direct and immediate supervision of a registered pharmacist whose certificate of registration is conspicuously displayed in the place where the same is prepared, dispensed or sold—shall for such offense be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by fine not exceeding three hundred dollars or by imprisonment not exceeding six months."

Section 3528, Compiled General Laws, provides that nothing in said Pharmacists' Law

"... shall apply to the practicing of a legally authorized practitioner of medicine from practicing, dispensing, compounding for or giving any medicines or poisons to his patients in the regular course of his practice as such physician."

Most hospitals carry on hand at the hospital a stock of drugs to be used in the treatment of patients of the hospital. Some such hospitals have a registered pharmacist in charge of such stock of drugs, who dispenses them for the various patients as needed; others do not, but merely allow nurses of the hospital to take the respective drugs from the hospital's supply room as needed for the patients. Such drugs as may be used by the patient are customarily charged to such patient and therefore constitute a sale of such drugs.

Section 15 (k) of the Florida Food, Drug and Cosmetic Law is clear in its provisions that the drugs enumerated therein, when sold, are misbranded unless sold on a written prescription signed by a member of the medical, dental or veterinary profession who is licensed by law to administer such drugs, and the label on the drugs so sold must bear the name and place of business of the seller, the serial number and date of the prescription therefor, and the name of the physician prescribing the same.

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A nurse as such has no right to compound or dispense drugs on either the written or oral prescription of a physician. She may, of course, and properly does, administer drugs under a physician's written and oral directions, but she is not authorized to compound or dispense the same, nor has a nurse any right as such to give or sell at retail medicines or poisons except under the direct and immediate supervision of a registered pharmacist whose certificate of registration is conspicuously displayed in the place where the same is prepared, dispensed or sold.

It is a general rule of law that a physician is liable for injury resulting from the failure of a nurse who is in his employ or acting under his direction, to administer the remedies which he has prescribed. However, the physician is not liable for the results of negligent acts of nurses who are not employed by him and over whose conduct he exercises no control. It is generally held that even though the physician does not employ the nurses who are in attendance upon a patient, yet if they are at the time under the physician's special supervision and control, he is responsible for an injury resulting from their negligence while acting in his behalf and under his direction; that is to say, the nurses, while acting under his direction and supervision, are his servants with respect to the work in which they are engaged, despite the fact that they may be in the general service of the hospital wherein they are employed, and for their negligence during that period of time he is generally liable. Therefore, if the physician actually produces one of the drugs mentioned in Section 15 (k), supra, and gives it to the nurse, to be in turn administered to the patient by her under the doctor's instructions and orders, then such practice, in my opinion, is permissible. However, if the physician merely tells the nurse that he wants the patient to have one of such drugs, it is my opinion that the nurse has no authority to procure any of such drugs from the hospital drug room or anywhere else without a written prescription therefor as required by the Act. Likewise, if such drugs are sold by the hospital from its drug supply to the patient, it is my opinion that a physician could not procure such drugs from the hospital drug supply without giving his prescription therefor, and the drug so taken from the drug supply would be required to bear the label referred to in the Act.

Therefore, trained nurses as such are not authorized under the law to dispense from hospital stocks those drugs enumerated in Section 15 (k) of the Florida Food, Drug and Cosmetic Law, unless they do so on a written prescription signed by a member of the medical, dental or veterinary profession who is licensed by law to administer such drugs, and unless such trained nurses are acting under the direct and immediate supervision of a registered pharmacist whose certificate of registration is conspicuously displayed in the place where such trained nurses are acting, and then such drugs, when so dispensed, must bear a label showing the name and place of business of the seller, the serial number and date of the prescription on which it is dispensed, and the name of the physician so prescribing the same; otherwise, such drugs are, in my opinion, misbranded and the sale thereof violates the provisions of the Florida Food, Drug and Cosmetic Law.

MILK COMMISSION

March 13, 1941.—041-133.

MILK CONTROL ACT—DURATION

QUESTION: Will Chapter 19231, Acts of 1939, which is known as the Milk Control Act, remain in effect after the adjournment of the next legislature?

REGULATIONS OF TRADE, COMMERCE AND INVESTMENTS— Milk Commission

To Hon. Spessard L. Holland, Governor:

Section 23 of Chapter 19231, Acts of 1939, provides for its duration as follows:

"DURATION OF COMMISSION.—A continuing emergency for the regulation of the business and industry herein named shall be presumed and deemed continuing and existing, calling for the need for the existence of this Act, and the same shall be effective *until such date as it is repealed or amended by some subsequent Act of the Legislature*, whenever any such continued emergency may be deemed essential to the continued validity of any of the provisions hereof."

The section specifically states that the Act is to continue in effect until it is repealed or amended. It appears to be a continuing Act, and it is my opinion that it will remain in effect until it is specifically repealed or amended by legislative action.

MILK COMMISSION

April 9, 1941.—041-187.

PRINCIPAL OFFICE—INTERPRETATION

QUESTION: It is impractical and virtually impossible to locate reasonable office space for the Florida Milk Commission in the State Capitol, and since most of the work accomplished by the Commission is in more densely populated areas than the section in which Tallahassee is located, is it sufficient, under the law, to maintain an office in Tallahassee, with a bulk of the Commission's business being transacted in an office or offices in other localities?

To Hon. Spessard L. Holland, Governor:

Section 3, Chapter 19231, Acts of 1939, relating to the supervision of production, sale and distribution of milk, provides, with respect to maintenance of offices for such Commission, as follows:

"The principal office of the Commission shall be in the City of Tallahassee, in rooms assigned by the proper State Officials who shall provide reasonable space for the use of the Administrator and Commission in the State Capitol, but offices in other localities may be maintained by the Commission."

The words "principal office" mean highest in rank, authority, character, importance, or degree. It is not necessarily determined by the office transacting the largest volume of business. The principal office, as such, must be maintained in the city of Tallahassee. If it is more practical and expedient, and the interest of the State would be best served by maintaining an office or offices in other localities, then sufficient authority is given for the maintenance of such office or offices. If there was no space available in the State Capitol, then space could be provided by the proper State Officials, at some other location. That location should be as close to the seat of State affairs as available office space will permit.

Therefore, the principal office of the Commission must be in Tallahassee, but offices in other localities may be maintained, which offices may in fact handle a larger volume of the Commission's business than that transacted in Tallahassee.

**REGULATIONS OF TRADE, COMMERCE AND INVESTMENTS—
Frozen Desserts Law****FROZEN DESSERTS LAW**

December 6, 1941.—041-678.

LICENSE TAX—DRUG STORES

QUESTION: Under the circumstances set forth below are the stores therein mentioned separate stores for the purpose of the license tax under the Frozen Desserts Law?

To Hon. Nathan Mayo, Commissioner of Agriculture:

West Side Drug Store, 1177 West Flagler Street, Miami, of which Charles H. Alderman, Jr. is the sole owner. The said Mr. Alderman also owns two shares in the corporation doing business under the trade name of High View Drug Store. Mr. Alderman, for his West Side Drug Store, has secured State License as a retail manufacturer of frozen desserts for the year ending September 30, 1942. This store has a frosting machine in which they freeze "frozen malted milks." This store buys and re-sells ice cream manufactured by the High View Drug Store. The High View Drug Store, of which Mr. W. R. Bowen is president, manufactures ice cream for themselves and for sale to the West Side Drug Store.

Obviously, the two drug stores are separate and distinct entities and, for all purposes of the Frozen Desserts Law with regard to licenses, should be treated as such.

HOTEL COMMISSION

January 14, 1941.—041-8.

EMPLOYEES—SALARY LIMITATIONS

QUESTION: What are the limitations on the salaries to be paid employees of the Hotel Commission?

To Hon. Hunter G. Johnson, Hotel Commissioner:

Section 29 of Chapter 16042, Acts of 1933, provides:

"The Hotel Commissioner is hereby empowered to appoint and employ such office help . . . as are necessary to carry out the provisions of this Act."

This Section limits the amount to be paid inspectors and supervising architects to not exceed one hundred fifty dollars (\$150.00) per month, and necessary traveling expenses, but it does not place a limitation on salaries to be paid "office employees," and in my opinion this Section contains the applicable law to your inquiry.

HOTEL COMMISSION

June 25, 1942.—042-320.

**HOTEL COMMISSIONER—POWER TO ABATE NUISANCES
TRACEABLE TO VENEREAL DISEASES**

QUESTION: What authority has the State Hotel Commission in abating nuisances traceable to venereal diseases in public places licensed by the Commission?

To Hon. Hunter G. Johnson, State Hotel Commissioner:

There is no specific statutory authority granting the Hotel Commission any power to act in such cases, and it is my opinion that there are

REGULATIONS OF TRADE, COMMERCE AND INVESTMENTS— Hotel Commission

governmental agencies with ample authority to handle such a situation. Should conditions exist as under Section 35, Chapter 16042, Acts of 1933, as amended by Chapter 17062, Acts of 1935, as follows:

"No person suffering from any contagious or communicable diseases shall be employed in any hotel, restaurant, apartment house or rooming house to prepare or handle food, drink, dishes, towels, or linens, or in any other capacity whereby such disease might be communicated to guests or tenants.

"All employees shall furnish health certificates including a Wasserman Test, signed by a registered licensed physician of the State of Florida, whenever the Hotel Commissioner or his Deputy, in his discretion, deems it necessary for the protection of public health," you can proceed accordingly.

HOTEL COMMISSION

November 26, 1941.—041-663.

HOTEL COMMISSIONER—REGULATIONS AFFECTING DUTIES

QUESTION: Under Chapter 20651, Acts of 1941, has the State Hotel Commissioner any right to approve or disapprove remodeling or construction of hotels, apartments, restaurants, etc., when the cost of such work is less than \$5000.00?

To Hon. Hunter G. Johnson, State Hotel Commissioner:

You need not be concerned with the provisions of Chapter 20651, Acts of 1941, because the same is an act only relating to the practice of architecture in the State of Florida. It has no bearing on the existing laws, rules, and regulations affecting your duties as Hotel Commissioner.

HOTEL COMMISSION

October 1, 1941.—041-181.

WAR VETERANS—EXEMPTION—HOTEL LICENSE

QUESTION: Is a disabled war veteran exempt from license tax exacted by Chapter 6952, Acts of 1915?

To Hon. Hunter G. Johnson, State Hotel Commissioner:

A disabled war veteran is not exempt from the license exacted by said Hotel Act, because I am now convinced that the exemption granted disabled war veterans is applicable only to occupational licenses and not to a license tax of the nature exacted by the Hotel Act.

HOTELS, RESTAURANTS, APARTMENTS; REGULATIONS

August 23, 1941.—041-471.

LICENSES—APARTMENTS, HOTELS, RESTAURANTS, ROOMING HOUSES

QUESTION: (1) A building contains three separate units providing accommodations for three families living independently of each other. The building is owned by Mr. "A", who occupies one unit, leasing the other two units to Mr. "B" and Mr. "C." Will this be classed as an apartment house and, if so, should the rooms occupied by the owner be counted in arriving at the license fee?

**REGULATIONS OF TRADE, COMMERCE AND INVESTMENTS—
Hotels, Restaurants, Apartments; Regulations**

(2) Will a duplex, though not an apartment house, come under the classification of a rooming house? (Meaning by the term "duplex" a structure or building providing for separate accommodations for two families living independently of each other.)

(3) If there are several duplexes, for example, six on the same or adjoining lots owned and operated by the same owner or manager, will they come under the classification of an apartment house and be subject to license as such? (Assigning the same meaning to the term "duplex" as in question (2)).

(4) Is a cafeteria located in a public or private school building in this State, that serves food to the students only, subject to the license tax of a restaurant, and should it be inspected by the Hotel Commission?

(5) Do dining and buffet cars operated by railroad companies come under the jurisdiction of the Hotel Commission because they sell food and, if so, are they required to be licensed and inspected by said Commission while operating within this State?

(6) Please advise how we may be able to determine when a person is guilty of intent to defraud an owner of a restaurant, hotel, or rooming house?

To Hon. Hunter G. Johnson, State Hotel Commissioner:

Such a building should not be classed as an apartment house. My reason for so ruling is based upon the wording of the statute. You will observe from reading the definition of the term "apartment house" that the accommodations are to be supplied to *transient or permanent guests or tenants*. The owner of the premises occupying one of the three units cannot be classed as a transient or as a guest or as a tenant. I am not unmindful of the fact that my ruling may make the enforcement of this provision of the law rather difficult for the reason that it will require a closer supervision on three-unit structures or buildings during the tourist season because, in my opinion, if the owner should rent or let his apartment for even a short duration, it would then come within the definition of an apartment house.

If the duplex is *kept, used, maintained, advertised, or held out to the public* to be a place where living quarters, sleeping or housekeeping accommodations are supplied for a consideration to guests or tenants that the same will constitute a rooming house. My construction of the meaning of the terms "kept", "used", "maintained", "advertised", or "held out to the public" is a continuous keeping or using or maintaining or advertising or holding out to the public as distinguished from an occasional leasing of a room or rooms.

Such duplexes will not come within the classification of an apartment house. My reason for so ruling is because the term "apartment house," as defined in the statute, contemplates a *single building or structure*.

Such a cafeteria is not subject to the license tax of a restaurant, and it is not your duty to inspect the same. My reason for so ruling is because the law contemplates and intends to regulate those places that *hold themselves out to the public* for the serving of meals, lunches, sandwiches, etc. If the public is free to patronize the school cafeteria, and, as a matter of fact, does patronize the cafeteria, then it is my opinion that such a cafeteria is within your jurisdiction.

Dining and buffet cars operated by railroad companies do come within your jurisdiction so far as their having to comply with Section 3384, Compiled General Laws, Permanent Supplement, which provides

**REGULATIONS OF TRADE, COMMERCE AND INVESTMENTS—
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that dining and buffet cars shall have all windows, doors, and other similar openings securely screened. I do not believe that a dining or buffet car operated by a railroad company comes within the definition of the term "restaurant" for the reason that the term "restaurant" contemplates a thing or place of a stationary nature.

It is not possible for me to lay down a hard and fast rule by which you can determine whether or not a person has obtained lodging or food or other accommodations at a hotel, apartment house, rooming house, or restaurant with intent to defraud, for the reason that "intent" is usually proven by circumstantial evidence. I call your attention to Section 7260, Compiled General Laws, Permanent Supplement, which provides:

"Any person who shall obtain food, lodging or other accommodations at any hotel, apartment house, rooming house, inn, boarding house or restaurant, with intent to defraud the owner or keeper thereof, shall be guilty of a misdemeanor, and shall upon conviction, be punished by imprisonment in the county jail not to exceed three months or by fine not exceeding one hundred dollars: Provided, that the provisions of this section shall not apply where there has been an agreement in writing for delay in payments."

and also to Section 7261, Compiled General Laws, Permanent Supplement, which provides:

"In prosecutions under the preceding section, proof that lodging, food or other accommodations were obtained by false pretense or by false or fictitious show or pretense of any baggage or other property, or by absconding without paying or offering to pay for such food, lodging or accommodations, or by surreptitiously removing or attempting to remove baggage, shall be prima facie evidence of the fraudulent intent mentioned in Section 7260."

HOTELS, RESTAURANTS, APARTMENTS; REGULATIONS

November 19, 1941.—041-659.

LICENSES—APARTMENT HOUSES—COMPUTATION OF UNITS

QUESTION: An apartment house is comprised of a given number of units. Each unit consists of a kitchen (which is also used as a dining room), living room and two bedrooms. Should the license fee be computed on the basis that each unit consists of four rooms, making a basic license charge of \$2.00 per unit, or should the apartment be considered a five-room apartment, making a basic license fee of \$2.50 per unit, because of the enactment of a rule by a former Hotel Commissioner, such rule providing, "And in an apartment having no designated dining room, any dining space wherever located shall be classed as a dining room"?

To Hon. Hunter G. Johnson, State Hotel Commissioner:

You have no right to construe such units as being comprised of five rooms, but you must construe the same as being comprised of four rooms.

My reasons for so ruling are as follows:

(1) The Legislature has specifically provided what shall comprise a room within the meaning of the law in Section 6 of Chapter 16042, Laws of Florida, Acts of 1933:

"In all hotels, apartment houses, and rooming houses within the meaning of this Act, the parlor, dining room, sleeping porch, kitchen, office and sample rooms shall be construed to mean rooms."

**REGULATIONS OF TRADE, COMMERCE AND INVESTMENTS—
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The law regulating the operation of hotels, apartments, restaurants, etc., is an exercise of the police power of the sovereign State, and the courts have held in construing such exercise of police power, tax measures, and criminal legislation that the same shall be given a strict construction, and the courts, therefore, will in construing such terms as "kitchen," "dining room," give the terms the usual and accepted meaning; the usual and accepted meaning of the respective terms being: A room used chiefly for the purpose of preparing food for consumption, and a room chiefly used for the serving of food to be eaten.

(2) Your predecessor in office had no authorization, nor do you have, to enact the rule that "And in an apartment having no designated dining room, any dining space wherever located shall be classed as a dining room," because such an attempt on his part amounts to a *declaration of what the law shall be*; this is beyond his powers and beyond the power of the Legislature to delegate to him, for, as our Supreme Court has repeatedly held,

"The Legislature may not delegate the power to enact a law or to declare what the law shall be, or to exercise an unrestricted discretion in applying the law; . . ." (Bailey vs. Van Pelt, 78 Fla. 337, 82 So. 789; State vs. Atlantic Coast Line Railroad Co., 56 Fla. 617, 47 So. 969.)

HOTELS, RESTAURANTS, APARTMENTS; REGULATIONS

March 3, 1942.—042-115.

LICENSES—REVOCATION—REINSTATEMENT

QUESTION: (1) If a license has been revoked, should the same license be reinstated after an establishment has complied with our requirements, or should a new fee be collected for a new license?

(2) When a dwelling house is remodeled so that one or two small apartments can be rented and the owner can still live in the house, is it your opinion that a license can be required on this as a rooming house and a license fee collected, or could it be classed as an apartment house and no license be required unless three apartments are rented therein?

To Hon. Hunter G. Johnson, State Hotel Commissioner:

(1) The license should be reinstated, which is based upon Section 3355 (2), Perm. Supp. Compiled General Laws of Florida, as follows:

"Such hotel, apartment house, rooming house or restaurant shall remain closed until such violation has been corrected and the hotel commissioner has reinstated said license."

(2) When a dwelling house is remodeled so that one or two small apartments can be rented and the owner can still live in the house, a license can still be required as a rooming house and a license fee collected, and my opinion is based on Section 3353, Perm. Supp. Vol. 3, Compiled General Laws of Florida, paragraph 3 as follows:

"Every house, boat, vehicle or other structure, or any place or location kept, used, maintained, advertised or held out to the public to be a place where living quarters, sleeping or housekeeping accommodations are supplied for pay to transient or permanent guests or tenants, whether in one or adjoining buildings, shall for the purpose of this law be deemed a rooming house, and upon proper application, the hotel commissioner shall issue to such above described business a license to conduct a rooming house."

A license cannot be collected as an apartment house, and I base my opinion on Section 3353, Perm. Supp. paragraph 2 as follows:

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"Any building or part thereof, where separate accommodations for more than two families living independently of each other, are supplied to transient or permanent guests or tenants, shall for the purpose of this law be deemed an apartment house, and upon proper application, the hotel commissioner shall issue to such above described business a license to conduct an apartment house."

HOTELS, RESTAURANTS, APARTMENTS; REGULATIONS

December 23, 1942.—042-578.

LICENSES—RESTAURANT AND ROOMING HOUSE

QUESTION: (1) Is an establishment, either a hotel or a rooming house, liable for a restaurant license where food is prepared and sold only to guests living in that particular establishment?

(2) Is an establishment consisting of a series of 2-unit apartment buildings situated on one plot of ground and under one ownership, though each building is separated from the adjoining one, subject to a license?

To Hon. Hunter G. Johnson, State Hotel Commissioner:

It is my opinion that it would be necessary for such an establishment to procure a restaurant license, if the establishment is maintained as, advertised as, or held out to the public to be a place where meals, lunches or sandwiches are prepared or served.

However, if food is sold only to guests living in that particular establishment, without being advertised or held out as an accommodation, then no restaurant license would be required; an example of a case where the license would not be required being as follows:

A place where rooms are rented and advertised, board may be also provided, but if not advertised and if furnished the roomer at the roomer's convenience because the roomer is lodging in the particular house, this kind of preparing and selling of food would not qualify for a restaurant license, because selling food only to roomers, which selling is not advertised or held out, is not equivalent to holding out to the public a place where lunches, sandwiches or meals are prepared and served.

A hotel establishment, of course, could not qualify as within the last described classification and would, by virtue of its being open to guests generally where it operates a place kept, used or maintained as a place where meals, lunches or sandwiches are prepared or served, be classifiable as a restaurant and liable for a restaurant license.

(2) It is my opinion that such an establishment is subject to a license as a rooming house, and I base my opinion on Section 511.01, Florida Statutes 1941, the third paragraph reading as follows:

"Every house, boat, vehicle or other structure, or any place or location kept, used, maintained, advertised or held out to the public to be a place where living quarters, sleeping or housekeeping accommodations are supplied for pay to transient or permanent guests or tenants, whether in one or adjoining buildings, shall for the purpose of this chapter be deemed a rooming house, and upon proper application, the hotel commissioner shall issue to such above described business a license to conduct a rooming house.

"In all hotels, apartment houses and rooming houses within the meaning of this chapter, the parlor, dining room, sleeping porches, kitchen, office and sample rooms shall be construed to mean rooms."

**REGULATIONS OF TRADE, COMMERCE AND INVESTMENTS—
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April 30, 1941.—041-237.

LICENSES—TRAVELING CONCESSIONS

QUESTIONS: Has the State Hotel Commission the authority to either license or refuse to license a traveling concession selling wrapped sandwiches and drinks from one location to another?

To Hon. Hunter G. Johnson, State Hotel Commissioner:

After reading Chapter 16042, Laws of Florida, 1933, particularly Sections 7, 16, 17, 18 and 19, it is my opinion that a vehicle or a concession on wheels does not come within the definition of the term "restaurant", nor was it the intent of the Act to apply to such vehicles.

HOTELS, RESTAURANTS, APARTMENTS; REGULATIONS

December 12, 1941.—041-686.

RESTAURANTS—INTERPRETATION

QUESTION: Does a place selling peanut butter cracker sandwiches come within the provisions of the restaurant law?

To Hon. Hunter G. Johnson, State Hotel Commissioner:

In my opinion the selling of such cracker sandwiches does not bring such place within the meaning of the term restaurant. I believe the court will construe the terms "meals, lunches, and sandwiches" in their ordinary and accepted meaning.

SWIMMING POOLS

September 2, 1941.—041-495.

BOARD OF HEALTH—JURISDICTION

QUESTION: Has the State Board of Health jurisdiction over pools operated by churches, institutes, societies and private schools, which pools are not open to the public but are used by adults and children attending the particular organization?

To State Board of Health, Jacksonville, Florida:

Section 1 of Chapter 7825, Laws of Florida, Acts of 1919 (Section 3768, Compiled General Laws of 1927) provides:

"The State Board of Health shall have supervision over the sanitation, healthfulness and cleanliness of swimming pools, bath houses, public swimming and bathing places and all related appurtenances and is hereby empowered to make and enforce such rules and regulations pertaining thereto as it shall deem proper."

It is my opinion that under that Section the State Board of Health has supervision over the swimming pools which you describe.

DRY CLEANING AND LAUNDRY INDUSTRY

September 11, 1941.—041-516.

**LICENSE TAX—COLLECTION OF ADDITIONAL FEE AFTER
ACCEPTING SUM TENDERED**

QUESTION: Does the Florida Dry Cleaning and Laundry Board after licensing an individual to operate as an agent have the right to

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demand from such person the additional fee which should have been paid because such individual is in reality operating as an independent contractor?

To Mr. W. T. Moore, Jr., Chairman, Florida Dry Cleaning & Laundry Board:

Investigation shows that in several cities within the State, there are a number of persons engaged in the solicitation of either laundry or dry cleaning, or both, as independent contractors. These men do not own any laundry plant, or dry cleaning plant but merely have a truck, and sometimes a stationary office, and they solicit either laundry or dry cleaning business and get the actual work done at a wholesale plant. In many instances these men have been licensed as agents, which under Section 7, paragraph 2 of Chapter 17894, Acts of 1937, carries a license of \$5.00. The facts show that such men were not agents but were independent contractors or operators and were subject to the \$25.00 license for conducting each business, that is laundry or dry cleaning, as provided for in the last paragraph of the aforesaid Section 7. However, the Board, through its Chief Supervisor, issued agency licenses.

By reason of having issued an agency license and accepted the fee therefor, the Florida Dry Cleaning and Laundry Board is now estopped from attempting to collect an additional license fee for the years for which such licenses were issued.

SMALL LOAN BUSINESS

July 29, 1941.—041-414.

BORROWERS—SECURITY

QUESTION: May small loan companies require borrowers to take out life insurance in the light of Chapter 20728, Acts of 1941?

To Hon. J. Edwin Larson, Insurance Commissioner:

Section 7 of said chapter prohibits small loan companies from requiring borrowers to procure life insurance. My reason for so ruling is that the said section provides:

"Any profit or advantage of any kind whatsoever that any person, co-partnership or corporation licensed hereunder . . . may contract for, collect, receive or in any wise obtain by a collateral sale, purchase, or agreement, in connection with any loan of \$300 or less, except commissions received as a person licensed by the Insurance Commissioner of Florida on insurance written as hereinafter permitted, shall be deemed to be interest or consideration for the purposes of regulation under this Act . . ." (Italics supplied.)

The Act goes on to provide that when the security consists of tangible personal property, the same may be reasonably insured against loss for a reasonable term, considering the circumstances of the loan, etc. It appears, therefore, that it was the intent of the legislature to prohibit the requiring of any kind of insurance save and except that specifically permitted by the statute, to-wit: insurance against loss on tangible personal property.

SMALL LOAN BUSINESS

August 5, 1941.—041-405.

INCORPORATION

QUESTION: What is the right of individuals owning and operating small loan corporation to incorporate an additional company for

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Small Loan Business**

making loans on other than a small loan basis? The two corporations would have an interlocking board of directors and officers occupying the same office space, but each would operate as separate entities and make loans to the same individual or individuals at the same time.

To Hon. J. Edwin Larson, State Treasurer:

There is no prohibition against individuals so incorporating and operating, assuming the bona fides of the incorporation and operation of these corporations,—for the reason that the doctrine that a corporation is a legal entity existing separate and apart from the persons composing it, is the legal theory introduced for the purpose of convenience and to sub-serve the ends of justice. This doctrine will not be extended to a point beyond reason and policy, and a corporate entity will be disregarded where the same is used as a cloak or cover for fraud or illegality.

SECURITIES

May 7, 1942.—042-222.

COMMISSION—AUTHORITY TO REQUIRE ESCROW AGREEMENT

QUESTION: Under the discretionary powers to prepare all necessary regulations in the administration and enforcement of the Florida Securities Act, may the Florida Securities Commission require all persons claiming exemptions under Section 5 (j) and (k) of said Act to escrow the funds until the amount proposed has been fully paid in and applied for the purpose claimed within a specified time, and upon failure of the party claiming such exemption to raise such funds, shall same be returned to the parties entitled thereto?

To Florida Securities Commission:

Section 5 (j) and (k) of the Florida Securities Act provides as follows:

“(j) Not exceeding twenty-five subscriptions for shares of the capital stock of a corporation prior to the incorporation thereof under the laws of this state when no expense is incurred, or no commission, compensation or remuneration is paid or given for or in connection with the sale or disposition of such securities.

“(k) The sale of its shares by any corporation organized under the laws of this state when the total number of shareholders does not and will not after such sale exceed twenty and the total face amount or the total sale price of such shares does not exceed ten thousand dollars; provided, that such securities are issued and disposed of for the sole account of the issuer in good faith and not for the purpose of evading the provisions of this Act.”

Section 5 further provides that written notice must be given the Commission in advance of the sale of securities in such exempt transactions, such notice to be on forms prescribed by the Commission and to contain such information as the Commission shall deem necessary to affirmatively show particular transactions to be in fact exempt transactions under the statute.

The purpose of the Florida Securities Act is to protect buyers of stocks and securities from persons engaged in the sale thereof, and the Commission is charged with the administration and enforcement of the Act to the end that such buyers may have the protection intended by the Act.

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Only certain exempt transactions must be called to the notice of the Commission under Section 5, *supra*. The purpose of this provision is, in my opinion, to satisfy the Commission of the bona fides of the proposed transactions, and until the Commission is so satisfied, such transactions may not be lawfully carried on.

The Commission has the authority, in order to guarantee the bona fides of the exempt transactions mentioned, to require funds derived from sales under Sections 5 (j) and (k) to be escrowed under an agreement satisfactory to the Commission, and which will give the buyers the protection intended by the Act.

SECURITIES

March 13, 1942.—042-129.

COMMISSION—CLAIMS AGAINST DEPOSIT OF SECURITIES

QUESTION: (1) Mrs. C. C. Parker (formerly Mrs. Grace L. Hartline) filed a claim against a deposit of securities held by the Florida Securities Commission in lieu of a surety bond for Ernest Berger d/b/a Ernest Berger Company, Tampa, Florida. What procedure should be followed?

(2) What procedure should be followed with reference to the suits filed in the Circuit and County Courts of Hillsborough County, Florida, against Ernest Berger d/b/a Ernest Berger Company, Tampa, Florida?

To Hon. J. Edwin Larson, Chairman, Florida Securities Commission:

(1) I have examined the records in the office of the Florida Securities Commission and find that formal claim was filed under date of June 25, 1937, within the statutory period of one year from the expiration date of the period for which the securities were filed as provided by statute, and it is my opinion the procedure which should have been followed, after the filing of the claim with the Commission, is that the claimant should have reduced the claim to judgment. There is no law under which the Securities Commission can pay the claim of any claimant, as this must be done through the courts on legal proceedings instituted therein.

(2) It is my opinion that the only course open to the Commission is to retain the security deposited in lieu of a surety bond until such time as the cases now pending have been disposed of in the court, either by way of a judgment or dismissal. The Commission would not be justified in releasing these securities while these cases are pending.

SECURITIES

July 23, 1942.—042-371.

COMMISSION—EXEMPTIONS—SALE OF STOCK UNDER EXEMPTION NOTICE—CANCELLATION OF CLAIM FOR EXEMPTION

QUESTION: A practicing attorney filed notice of exemption with the Florida Securities Commission under the provisions of Section 5 (j) of Chapter 14899, Acts of 1931, as amended, to sell certain preorganization stock, naming himself as trustee and principal promoter. Later, it develops that the attorney was interested only as an attorney, and that the notice of exemption was really filed for two others who are the real parties in interest and promoters of the enterprise. It was not revealed by the notice of exemption that the other parties were interested, nor was it revealed by such notice that such parties were the real promoters. These undisclosed promoters sold some \$6,000 worth of the preorganiza-

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tion stock to some sixteen subscribers. The attorney in question informed examiners of the Florida Securities Commission that the undisclosed promoters employed him to file the notice of exemption in his name because the Florida Securities Commission did not like them, implying that had they filed the notice of exemption it would not have been allowed by the Commission.

(1) Under the circumstances and conditions stated, can the undisclosed promoters legally solicit and sell such preorganization stock under the claim that they are receiving no commission, compensation, or remuneration, when in fact it is their own promotion and they are the real beneficiaries?

(2) Can the Commission now cancel the claim for exemption filed because of the deceit practiced in filing same?

To Florida Securities Commission:

The Florida Uniform Sale of Securities Act provides that:

"Section 5. **EXEMPT TRANSACTIONS.** Except as hereafter expressly provided, the provisions of this Act shall not apply to the sale of any security in any of the following transactions:

"(j) Not exceeding twenty-five subscriptions for shares of the capital stock of a corporation prior to the incorporation thereof under the laws of this state when no expense is incurred, or no commission, compensation or remuneration is paid or given for or in connection with the sale or disposition of such securities."

Section 5 further provides as follows:

"In any of the transactions hereinabove referred to in subparagraphs (h), (i), (j), (k) and (11), of this section, written notice is hereby required to be given to said Florida Securities Commission in advance of the sale of securities in such exempt transactions, such notice to be on forms prescribed as the Florida Securities Commission and to contain such information as the Florida Securities Commission shall deem necessary to affirmatively show particular transactions to be in fact exempt transactions under this section."

Section 13 of the Act provides that the burden of establishing the right to any exemption under the Act shall be upon the party claiming the benefit of such exemption, and Section 17 of the Act provides that whoever violates *any* of the provisions of the Act shall be guilty of a felony, and upon conviction thereof shall be punished as provided therein.

The form prescribed by the Commission for the notice of exemption required by Section 5 imposes upon the applicant the duty of disclosing to the Commission the real trustee or principal promoter, in order that the Commission may know to whom it may look for a bona fide operation under the exemption of the proposed preorganization sale of stock.

The purpose of the Act generally is to protect the public against fraud, and the purpose of the notice of exemption under Section 5, *supra*, is to afford the Commission an opportunity to investigate the bona fides of the parties involved and the plan under which the preorganization sale of stock is proposed to be made, in order that the exemptions allowed under the Act may not be employed by an unconscionable promoter as a vehicle for defrauding the public.

In the present situation the notice of exemption fails to disclose important information, to-wit: the real promoters of the enterprise and sale of stock. Inasmuch as it has developed that the notice of exemption

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misrepresents the facts in this particular, the Commission is justified, I think, in suspecting the bona fides of the remaining information contained in the notice. If a notice of exemption such as this can be filed in the manner as the present one was filed, then there is but little protection afforded under the statute requiring such notice.

Even though it may be claimed that the real but undisclosed promoters who are selling the preorganization stock are receiving no commission, compensation or remuneration therefor, it still remains that such promoters may very easily secure a delayed compensation, commission or remuneration in another form, to-wit: profits to them derived from a sale of leases or other assets to the contemplated corporation.

It is my opinion, therefore, that undisclosed promoters are not authorized to sell preorganization stock under a notice of exemption filed by another, even though they claim that they are receiving no compensation, commission or remuneration therefor.

It is further my opinion that the Commission may treat the notice of exemption which fails to disclose primary and important information, as a nullity and cancel the same because of the apparent deceit practiced in filing the same.

SECURITIES

September 18, 1941.—041-536.

COMMISSION—REPORTS TO UNIVERSITIES

QUESTION: Under the provisions of Chapters 20229 and 20742, Acts of 1941, does the Florida Securities Commission have to furnish copies of its annual report to State Universities?

To Florida Securities Commission:

You are not required to furnish copies of your annual report to the State University of Florida, Florida State College for Women, University of Miami, Stetson University, and University of Tampa for the reason that Chapter 20229, and Chapter 20742, Acts of 1941, are not applicable.

SECURITIES

October 22, 1941.—041-606.

COMMISSION—SPECIAL EXAMINER—APPOINTMENT

QUESTION: An order was issued directing a salesman to show cause why his license should not be revoked. On the day of the hearing no member of the Securities Commission was present, and the Executive Secretary conducted the hearing, reduced the testimony to writing and reported the same at a regular meeting of the Commission, at which meeting a resolution was passed ratifying the action of the Executive Secretary, and an attempt was made to appoint him as Examiner in said cause, making the order of appointment retroactive to the date of the hearing. At this same meeting by resolution the Executive Secretary was appointed "Examiner" to take the testimony of witnesses and to conduct hearings in all future cases wherein an order to show cause had been issued. Upon this state of facts,

(1) Did the Commission act within its legal rights in appointing an examiner to take testimony in a hearing that had already been conducted, by approving and confirming his action and making such appointment retroactive to the hearing date?

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(2) Did the Commission have authority to appoint a general examiner to take testimony and conduct hearings in all cases wherein an order to show cause had been issued, as contemplated by Sections 10, 12 and 15 of the Securities Act?

To Florida Securities Commission:

The answer to both these questions is "No."

The Securities Act contemplates that you shall first satisfy yourself that there is a reasonable basis for the complaint or reasonable grounds for the conducting of an investigation or hearing before you issue an order providing for the investigation, examination and hearing into the alleged violation.

The Securities Act provides, (Sec. 15½) relative to the appointment of the examiner: "... a discreet person without bias or prejudice in said cause. . . ." It is possible that an examiner might qualify in ninety-nine instances, but be biased or prejudiced in the hundredth instance.

Our Supreme Court has said:

"The authority of public officers to proceed in a particular way or only upon specific conditions implies a duty not to proceed in any manner than that which is authorized by law." (White vs. Crandon, 156 So. 303, 305) apparently not following the general rule of law that public officials may ratify such acts as they could in the first instance have authorized. (Mizen vs. Adams County, 147 N. W. 699; Gage County vs. Wright, 125 N. W. 626.)

From a practical standpoint, I do not see where your proposed procedure would prove more expedient than the procedure if the letter of the Act is followed, because before an examiner is authorized to conduct a hearing an order from you so authorizing and directing is a prerequisite, and when you issue such an order it is a simple matter to incorporate therein the appointment of the examiner.

SECURITIES

July 22, 1941.—041-390.

CORPORATIONS—APPLICATION TO QUALIFY—AMENDMENT

QUESTION: A corporation filed its application to qualify its securities for sale, the required fee accompanying the application; the Commission duly considered the application, but refused to pass upon the same favorably; and the applicant has now filed an amendment to his original application and requests the Commission to reconsider. May the Commission consider the application as amended or does an entirely new application have to be filed? Must the applicant tender another filing fee?

To Florida Securities Commission:

You may consider this application, as amended, as though you were granting a rehearing, and without requiring a further filing fee. If you should deem it advisable to require a new application, then it appears that you should require the additional fee.

The disposition of such cases, as the instant one, lies within your sound judgment and discretion.

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July 25, 1941.—041-402.

CORPORATIONS—EXEMPTIONS

QUESTION: Corporation A, under the provisions of Section 5 (j) raised the sum of \$50,000.00 among twenty-five subscribers and procured a charter from the Secretary of State. One month after the charter was granted Corporation A filed notice of exemption with the Securities Commission (having previously filed notice of exemption under its preorganization subscriptions) that it will sell to not to exceed twenty persons the total face amount or the total sales price of such shares not to exceed \$10,000.00. Under these facts, is Corporation A entitled to exemption under the provisions of Section 5 (k) of the Securities Act?

To Florida Securities Commission, Hon. G. S. Johnston, Executive Secretary:

It is my opinion that the said corporation would not be entitled to the exemption under the provisions of Section 5 (k) of the Securities Act for the reason that the total face amount or the total sales price would exceed \$10,000.00 (\$50,000.00 pre-organization already having exceeded the limit set forth in 5 (k)).

A corporation may avail itself of 5 (j) and 5 (k), but in order to do so the *total shareholders* must not exceed twenty, and the total face amount or the total sales price of *all stock* issued does not exceed \$10,000.00 and the company's otherwise complying with the provisions of the law. Perhaps this example will clarify the matter:

5 (j) Pre-organization—5 subscribers—

Total face amount \$5,000.00;

5 (k) After incorporation—15 shareholders—

Total face amount \$5,000.00.

Total shareholders 20—Total face amount \$10,000.00.

SECURITIES

March 20, 1941.—041-159.

DEALERS—DEFINITION

QUESTION: Is a corporation whose charter gives it the privilege of dealing in securities required to register as a dealer under the provisions of Chapter 14899, Acts of 1931 amendatory thereof, even though such corporation is not actually engaged in the business of dealing in securities?

To Florida Securities Commission, Attention Hon. G. S. Johnston, Executive Secretary:

I call your attention to Section 6002 (2) Sub-section 4, C. G. L. Perm. Supp. wherein the term "dealer" is defined to include:

"... every person other than a salesman who in this State engages for all or part of his time directly or through an agent in the business of selling any securities issued by another person or purchasing or otherwise acquiring such securities from another for the purpose of reselling them or of offering them for sale to the public, or offering, buying, selling or otherwise dealing or trading in securities as agent or principal for a commission or at a profit, or who deals in futures or differences in market quotations of prices or values of any securities or accepts margins on purchases or sales or pretended purchases or sales of securities..."

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I believe that it is the intent of our Securities Act to protect the investing public and to regulate the registering of stock and bond dealers and salesmen who are selling securities to the public or who are acting as agents in selling for the owners.

It is my opinion that a corporation whose charter gives it the privilege of dealing in securities but who does not actually engage in the business of dealing in securities is not required to register as a dealer under the provisions of our Securities Act for the reason that such a corporation does not come within the definition of "dealer" nor was the Act intended to make such corporations register as a dealer.

SECURITIES

November 14, 1941.—041-644.

DEALERS—DEFINITION

QUESTION: Is a person a dealer as contemplated by the Securities Act, if such person contacts counties, cities and other taxing districts for the purpose of finding for such district a purchaser of its bonds, such person never actually handling the bonds, but simply putting the buyer and seller in touch with each other for the purpose of effecting a sale for a commission or profit to such person?

To Florida Securities Commission:

Such a person does constitute a dealer within the definition given the term in the Securities Act. The term being defined:

"'Dealer' shall include every person other than a salesman who in this State engages for all or part of his time directly or through an agent in the business of selling any securities issued by another person . . . for a commission or at a profit . . ."

SECURITIES

October 29, 1942.—042-502.

DEALERS—EXEMPTION

QUESTION: Is a person who is exchanging oil leases for securities and selling these securities through registered dealers in this State entitled to avail himself of the exemption contained in Section 5 (e) of Chapter 14899, Acts of 1931, as amended, or is such person a "dealer" within the purview of Section 1 (4) of the law?

To Hon. J. Edwin Larson, Chairman, Florida Securities Commission:

The applicable portion of Section 1 (4), Chapter 14899, defining a dealer, reads as follows:

"'Dealer' shall include every person other than a salesman who in this state engages for all or part of his time directly or through an agent in the business of selling any securities issued by another person or purchasing or otherwise acquiring such securities from another for the purpose of re-selling them or of offering them for sale to the public, or offering, buying, selling or otherwise dealing or trading in securities as agent or principal for a commission or at a profit, or who deals in futures or differences in market quotations of prices or values of any securities or accepts margins on purchases or sales or pretended purchases or sales of securities; provided that the word 'dealer' shall not include a person having no place of business in this state who sells or

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offers to sell securities exclusively to brokers or dealers actually engaged in buying and selling securities as a business."

The exemption contained in Section 5 (e) of said law reads as follows:

"The sale, transfer or delivery of any securities to any bank, savings institution, trust company, insurance company, or to any corporation or to any broker or dealer; provided, that such broker or dealer is actually engaged in buying and selling securities as a business."

It is my opinion that the exemption quoted last above applies to isolated transactions permitting the bona fide owner of securities to dispose of same by a single transaction in the manner stated, but does not apply to one who is actually engaged in such transactions as a business or livelihood. If he is regularly engaged in such activities, he is a dealer within the purview of the law.

There is a proviso and exception contained in the definition of "dealer" which reads as follows:

"... Provided that the word 'dealer' shall not include a person having no place of business in this state who sells or offers to sell securities exclusively to brokers or dealers actually engaged in buying or selling securities as a business."

It is my opinion that the same reasoning applies to this exception as applies to the exemption contained in Section 5 (e) above, and that is the mere fact that a person does not operate and maintain a regular office does not place him beyond the provisions of the securities law when he is carrying on all the activities of a regular dealer who actually maintains an office as such. Such person is merely promoting a scheme with the intent of evading the provisions of the law.

It is, therefore, my opinion that a person who is actually engaged in the business usually carried on by a securities dealer in buying and selling or otherwise dealing and trading in securities comes within the definition of "dealer" as quoted above, even though such person has no regular place of business. It is my further opinion from the facts stated that the exemption in Section 5 (e) is not available to such a person, and that he is acting as a dealer in violation of the uniform sale of securities law.

SECURITIES

February 7, 1942.—042-67.

DEALERS—PERSONAL BOND—RESIDENCE REQUIREMENTS

QUESTION: What length of residence is required before a person is eligible to file a personal bond under Section 6002 (12-c), Compiled General Laws, Perm. Supp.?

To Florida Securities Commission:

There is no length of residence provided in said section. Therefore, in my opinion, length of residence of such a person is immaterial. It may be well to call your attention to the fact that the establishing of residence consists of facts and intention. (*Wade vs. Wade*, 113 So. 374; *Warren vs. Warren*, 75 So. 35.)

SECURITIES

October 27, 1942.—042-501.

DEALERS—REGISTRATION OF AGENTS

QUESTION: (1) Is an agent violating the Securities Law by acting as a dealer in purchasing and selling bonds on his own account while registered only as an agent for a particular firm?

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(2) Is a dealer violating the Securities Law when he employs as agent and pays a commission to a person who is registered as agent for another firm and is not registered as the agent for the dealer employing his services?

(3) Is an agent violating the Securities Law by acting as agent for a dealer for whom he is not duly registered with the Florida Securities Commission?

To Hon. J. Edwin Larson, Chairman, Florida Securities Commission:

I respectfully refer you to Section 517.12, Florida Statutes, 1941.

For answer to question (1), it is my opinion that an agent is violating the Securities Law when acting as a dealer in purchasing and selling bonds in his own name while registered only as an agent for a particular firm.

My reason in answering this question in the affirmative is because of Paragraphs 2, 4 and 5 of Section 517.12, Florida Statutes, 1941.

Paragraph 2 requires an application in writing verified by oath which shall state the principal office of applicant, and the location of the principal office and all branch offices in this State, if any; the name or style of doing business, the names and business addresses of all persons interested in the business as principals, co-partners, officers, and directors, specifying as to each his capacity and title, the general plan and character of business and the length of time the dealer has been engaged in business. The Commission may also require additional information as to applicant's past history, etc.

Paragraph 4 of said Section in substance provides that if the Commission shall find that the applicant has complied with all requirements, including the payment of the fee as a dealer, and has filed a bond in the amount of Five Thousand Dollars conditioned upon faithful compliance with the provisions of said Section, the Commission shall register him as a dealer and all salesmen registered by him.

Paragraph 5 of said Section 517.12 substantially provides that upon written application by a dealer and general satisfactory showing as to good character, and the payment of the proper fee, the Commission shall register as salesmen of such dealer such natural persons as the dealer may request. Such registration shall cease upon the termination of the employment of such salesman by such dealer.

It clearly appears from the wording of Paragraph 5 that an agent shall be registered by a dealer at his request and that such agent has no authority to act except for the particular dealer who has had him registered.

For answer to question (2), it is my opinion that a dealer is violating the Securities Law when he employs as an agent and pays a commission to a person who is registered as an agent for another firm and is not registered as the agent for the dealer employing his services.

My reason in answering this question in the affirmative is the wording of Paragraphs 4 and 5 of said Section.

For answer to the third question upon which you have not specifically requested an opinion, but in which I assume you are interested, it is my opinion that this question likewise should be answered in the affirmative.

Summarizing my conclusions, it is my opinion that no dealer can lawfully employ an agent not registered by him. Neither can an agent

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act as a dealer when he is only registered as an agent nor can an agent work for a dealer when not registered by such dealer. The bond of each dealer stands good for the acts of all of his agents and if a dealer is permitted to employ the services of an agent registered by other dealers, there would be no necessity of employing agents of his own and assuming liability for their acts.

SECURITIES

September 24, 1942.—042-461.

DEALERS—RESIGNATION—WITHDRAWAL OF REGISTRATION

QUESTION: Has a dealer in securities the right to withdraw voluntarily its registration with the Florida Securities Commission when the dealer is being investigated for violating the Securities Law, or has the Florida Securities Commission the right and power to refuse to accept such resignation under such circumstances and to continue their investigation to determine if the dealer's conduct is such as to justify a revocation of the dealer's license and registration?

To Florida Securities Commission:

I hand you herewith my report and recommendation on the two matters mentioned, namely: Florida Bond & Shares, Inc., and Guaranty Underwriters, Inc.

Inasmuch as the facts are not identical with the two companies, I shall treat them separately, but when related will refer to them collectively.

With reference to Florida Bond & Shares, Inc., which I shall first consider, I wish to call to your attention the following facts. It appears from the correspondence which has been given to me that the Securities and Exchange Commission revoked the registration of Florida Bond & Shares, Inc., as of May 24, 1942, and with this knowledge the Florida Securities Commission issued an order June 3, 1942, to Florida Bond & Shares, Inc., to show cause why its permit in this State should not be revoked, and hearing was set for June 26. Thereafter, Mr. Courtney, president of the said company, asked for sixty days' extension to answer the order to show cause, which was granted, and thereafter the company asked that it be permitted to terminate voluntarily its registration as of August 25, 1942.

You will note that Florida Bond & Shares, Inc., requested that it be permitted to withdraw its registration one day before the hearing was to be had on the motion to show cause why its registration should not be revoked.

In the correspondence which has been handed to me, there is an order entered by the Securities and Exchange Commission, under date of May 25, 1942, revoking the registration of Florida Bond & Shares, Inc., as a broker and dealer.

I refer you to Section 517.12, Florida Statutes, 1941: Registration of Dealers and Salesmen; also to Section 517.16: Revocation of Dealers and Salesmen.

The correspondence shows that Florida Bond & Shares, Inc., had violated several provisions of the Securities and Exchange Commission, and it appears to me as though it becomes the duty of the Florida Securities Commission to refuse to allow Florida Bond & Shares, Inc., to terminate voluntarily its registration, but to continue with its hearing originally set to show cause why its permit in this State should not be re-

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voked. Florida Bond & Shares, Inc., by the violation of the rules of the Securities Exchange Commission is subject to having its registration revoked under Sub-sections 3, 4, and 8 of Section 517.11, Florida Statutes, 1941.

It is, therefore, my opinion that the registration of Florida Bond & Shares, Inc., should be suspended and it so notified of such suspension with the reasons therefor, and that Florida Bond & Shares, Inc., be notified that its voluntary offer of withdrawal of its registration is refused, but with the further recommendation that it be allowed to show cause on a certain day why its registration should not be revoked and upon its failure to so do that the Florida Securities Commission shall enter a final order revoking the registration of said company in the State of Florida, and that the revocation appear on the register of dealers and salesmen.

With reference to Guaranty Underwriters, Inc., it appears from the correspondence enclosed in the file attached that this company was cited by the Securities and Exchange Commission to show cause why its permit as a dealer should not be revoked, and on August 20, 1942, the Florida Securities Commission received a letter from Guaranty Underwriters, Inc., requesting that its permit as a dealer in the State of Florida be terminated by the Florida Securities Commission, and about the same time this company requested the Securities and Exchange Commission to terminate its dealer's permit, and also resigned as a member of the National Association of Securities Dealers. From the correspondence, it appears that the Guaranty Underwriters, Inc., filed an injunction suit in the Federal Court for the Southern District of Florida, Jacksonville Division, against Edward C. Johnson, individually and as agent and employee of the Securities Exchange Commission, whereupon the defendant filed motion to dismiss and on hearing the motion Judge Curtis L. Waller, U. S. District Judge, ordered that the motion to dismiss the complaint as amended be sustained and said cause was dismissed at the cost of plaintiff. I respectfully refer the Commission to the following portion of Judge Waller's order:

"It is conceivable that a dealer might be guilty of willful violations of the law that would subject him to the criminal provisions of the law, in which event it would be the duty of the Commission to refer the matter to the Attorney General. It would not seem that a dealer, by stating that he had withdrawn or ceased to do business, could thereby end the matter. While the revocation of a registration or the expulsion of a member, strictly speaking, is not in the nature of a criminal proceeding, yet there is quite a distinction in the position of one who could say, 'I resigned,' and one who says, 'I was expelled.' It is conceivable that instances could arise where expulsion, with the onus that goes with it, might be more appropriate than voluntary withdrawal. Furthermore, a dealer should not be permitted to place himself beyond the jurisdiction of the Commission until he has fulfilled the obligations which he incurred while enjoying the franchise or privilege of a registered dealer with the Commission. The reasons justify and exemplify the necessity for the provisions in the statute that a registrant might withdraw upon meeting the terms and conditions imposed by the Commission. In the imposition of these terms and conditions a discretion is vested in the Commission. The Courts cannot control the discretion of a Commission and will not intervene unless there has been a grave abuse of discretion. There is no showing here of any abuse of discretion because the terms and conditions upon which withdrawal might be had have not been fixed."

Section 517.28 Florida Statutes, 1941 has the following provision:

"The securities commission may make any reasonable rules and regulations which it may deem necessary to cooperate effectively with

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the federal trade commission, or any other agency of the United States government which may have supervision or control over the sale of securities in interstate commerce under any law of the United States and may apply to intrastate sales or offerings such federal laws and regulations applicable to such sales or offerings in interstate commerce, as the commission may deem necessary for the proper conduct of such intrastate sales or offerings, and not in conflict with the laws of this state."

In view of the above statute and of the facts which this Commission has knowledge of pertaining to the situation existing between the Securities Exchange Commission and Guaranty Underwriters, Inc., and of the comments of Judge Waller, it appears to me that the Florida Securities Commission should not allow the withdrawal of the registration of Guaranty Underwriters, Inc. It is, therefore, my recommendation that the request to withdraw its registration by Guaranty Underwriters, Inc., be held in abeyance until the matter between the Securities Exchange Commission and Guaranty Underwriters, Inc., is finally settled and determined.

SECURITIES

January 21, 1941.—041-14.

DEPOSITS—IN LIEU OF BOND

QUESTION: Where a corporation formerly owned by an individual and family changes its registration as a broker-dealer to an individual, may the Commission accept the same deposit, covering the same securities that were on deposit on behalf of the corporation, or should an additional deposit be required?

To Hon. J. Edwin Larson, State Treasurer—Chairman, Florida Securities Commission:

In reply I wish to advise that I have examined Section 2 of Chapter 16174, Laws of Florida, Acts of 1933. I find that this Section provides:

"In lieu of said bond the applicant may, if he so desires, deposit with the Florida Securities Commission, United States government bonds of the value of Five Thousand Dollars (\$5,000.00) or cash in the sum of Five Thousand Dollars (\$5,000.00) or other securities satisfactory to the Commission, and provided that the total liability under such bond or deposit shall be Five Thousand Dollars (\$5,000.00) . . . and provided, further, that no claim or claims under such bond or deposit of United States government bonds or cash shall be enforceable unless presented to the Florida Securities Commission within one year after the expiration of the term for which the bond was given or deposit made, and that if no claim or claims are so presented, then, *after the expiration of such year, the bond shall be cancelled or the United States government bonds or cash shall be returned to the party depositing same.*" (Italics ours.)

Under the above quoted provisions of the statutes, any person having a claim against the deposit put up by Ed C. Wright & Company, a Florida Corporation, would have one year, after the expiration of the term for which the bond was given or deposit made, within which to present any claims that such person might have against said corporation.

It is conceivable that claims might be presented against said Corporation that would consume the full amount of said deposit of \$5,000.00, and although Ed C. Wright & Company, not incorporated, has agreed to accept full liability for any acts of the Corporation, I am of the opinion that this is not sufficient compliance with the Act because Ed C. Wright & Company, a Florida Corporation, must, under the terms of the Act,

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Securities**

have on deposit with the Commission the full amount of said sum of \$5,000.00 until the time has elapsed within which claims can be made against the same, and that Mr. Wright's application to do business as Ed C. Wright & Company, not incorporated, must be considered upon the same basis as any other applicant who wishes to qualify under the terms of said Act, and that he must have on deposit the full amount required by said Act of \$5,000.00 so that any claim or claims filed against him as an individual can be fully satisfied out of his individual deposit up to said sum of \$5,000.00.

SECURITIES

May 7, 1942.—042-221.

DEPOSITS—SUBSTITUTION

QUESTION: May the Florida Securities Commission legally accept retroactive surety or personal bonds from dealers in governmental securities and release to such dealers securities which have been deposited by them in lieu of bonds after the liability period has expired and the securities are being held for the one-year period after the expiration of such liability period to allow any possible claims to be filed as provided by statute?

To Florida Securities Commission:

The statute provides that no claim or claims under such bond or deposit shall be enforceable unless presented to the Florida Securities Commission within one year after the expiration for which the bond was given or deposit made, and if no claim or claims are so presented, then after the expiration of such year the bond shall be cancelled or the securities returned to the party depositing the same.

Such bonds or securities are deposited with the Commission for the protection of the members of the public having transactions with the dealer making such bond or deposit. After the bonds or securities have been deposited and the liability period has expired, the rights of possible claimants under such bonds or deposits become fixed and may be satisfied within the year following the liability period.

Therefore the Commission has no legal authority to authorize any change whatever in the bond or deposit from which possible claimants are entitled to satisfy their claims under the statute.

SECURITIES

September 22, 1941.—041-540.

PUBLIC UTILITY OPERATING COMPANY—EXEMPTION

QUESTION: Is a public utility operating company which comes within the provisions of the Public Utility Holding Company Act exempt under the provisions of Section 4 (d) of the Florida Securities Act?

To Florida Securities Commission:

A public utility operating company which has complied with the provisions of the Public Utility Holding Company Act of 1935 (Title 15, Section 79 (a) to 79 (z), inclusive) is exempt under the provisions of Section 4 (d) of the Florida Securities Act which provides as to exempt securities:

"Any security issued . . . by a corporation owning or operating a railroad or any other public utility; provided, that such corporation is

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subject to regulation or supervision either as to its rates or charges or as to the issue of its own securities by a public commission, board, or officer of the Government of the United States. . . ."

SECURITIES

March 15, 1941.—041-141.

PUBLIC UTILITY SECURITIES—REGISTRATION AND SALE

QUESTION: Is the registration and sale of securities of Public Utility Corporations in Florida subject to the Securities Commission under Section 4 (d) of Chapter 14899, Acts of 1931?

To Florida Securities Commission:

I call your attention to Section 4 (d) of Chapter 14899, Acts of 1931, which exempts certain securities:

"Any security issued or guaranteed either as to principal, interest or dividend by a corporation owning or operating a railroad or any other public service utility; provided, that such corporation is subject to regulation or supervision either as to its rates and charges or as to the issue of its own securities by a public commission, board or officer of the Government of the United States, . . ."

I also call your attention to Section 5 (1) of said Chapter as amended, which exempts certain transactions. This section provides:

"The sale or distribution of securities of any public utility corporation operating in this state, or the securities of any public utility controlling such first mentioned public utility which is subject to regulation by the Public Service Commission of any state or by the Interstate Commerce Commission or by any other similar state or federal regulatory body, when such securities are 'exempt securities' under Section 4 of this Act and such sale or distribution is made by the corporation issuing such securities or any subsidiary thereof, through the employees of the public utility so operating in this state."

It is my opinion that the securities of any public utility corporation operating in this state and who is subject to regulation or supervision either as to its rates and charges or as to the issue of its own securities by a public commission, board or officer of the Government of the United States are exempt securities under Section 4 (d) of Chapter 14899, Acts of 1931, as amended.

It is further my opinion that the sale of any securities of any corporation which comes within the specifications mentioned in the foregoing paragraph are exempt transactions when the sale or distribution is made directly by the corporation issuing such securities or any subsidiary thereof or through the employees of the public utility corporation so operating in this state.

It is further my opinion that a public utility corporation need not file its petition requesting the decree or order of the Securities Commission to the effect that its securities are exempt securities and the sale of same are exempt transactions; nor is the Commission required to issue its order or decree decreeing that the securities are exempt securities and that the sale of such securities are exempt transactions so far as the sale by the said corporation and its employees thereunder is affected, but the issuance of such an order is purely a matter of discretion with the Securities Commission.

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Securities

SECURITIES

May 22, 1941.—041-280.

SALES—EXEMPTIONS CONSTRUED

QUESTION: The Farmers and Growers Protective Association, a mutual benefit association, proposes to enter into a contract with Mr. A, giving him the exclusive right to one-half of the State to obtain members for the association, and also enters into another contract with Mr. B, giving him the exclusive right to the other half of the State to obtain members. That, in consideration of this contract, Mr. A and Mr. B would be entitled to a percentage of all premiums received for insurance written for such membership. Mr. A and Mr. B, in turn, propose to divide each of their half of the State into four districts and form a corporation for each district with an authorized capital stock issue of \$10,000, and assign to each of these corporations their exclusive right to obtain members to each of these particular districts in consideration of \$5,000. The corporations, that would in turn endeavor to secure members for the association (which in effect means the selling of insurance in the association), would be entitled to 10 per cent of all premiums written. Mr. A and Mr. B, who would receive the \$5,000 from each of these corporations would, in turn, deliver the same to the association, so that the association could meet the requirements as to deposits for mutual benefit associations. They propose to have four corporations in each half of the State with an authorized capital not exceeding \$10,000, instead of two corporations of \$20,000. Under the foregoing facts, may the securities be sold under Section 5 (k) of the Florida Securities Act?

To Hon. J. Edwin Larson, Chairman, Florida Securities Commission:

Section 5 (k) of the Securities Act, relating to exempt transactions, provides:

"The sale of its shares by any corporation organized under the laws of this State when the total number of shareholders does not and will not after such sale exceed twenty and the total face amount or the total sale price of such shares does not exceed ten thousand dollars; provided, that such securities are issued and disposed of for the sole account of the issuer in good faith and not for the purpose of evading the provisions of this Act."

It is my opinion that this plan of operation is for the purpose of evading the provisions of the Securities Act. It follows, therefore, that Section 5 (k), supra, is not applicable, and that these corporations will have to qualify with the Securities Commission before they are authorized to dispose of their securities.

SECURITIES

September 19, 1942.—042-455.

SALES—EXEMPTIONS CONSTRUED

QUESTION: Under date of March 29, 1941, P. C. Miller filed on behalf of National Safety Signal Company a notice of exemption under the provisions of Section 5 (c) of Chapter 14899, Laws of Florida, Acts of 1931 as amended, to sell not to exceed twenty-five subscribers not more than 2000 shares of certain stock at \$10 per share. Under this exemption said stock was sold and the Corporation was chartered June 4, 1941.

The capital structure of the Corporation by classes was to be 6500 shares of the par value of \$10. Subsequently Alex J. Kay of Lakeland was issued 2400 shares and P. C. Miller was issued 250 shares of such

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stock, allegedly for and in consideration of services rendered and to be rendered to said Corporation. The shares issued to Kay were issued in approximately 113 certificates in denominations of 50, 25, 10 and 5 shares each. Immediately upon the issuance of this stock to Kay by P. C. Miller as secretary-treasurer of the Corporation, Kay, in most cases accompanied by the said P. C. Miller, proceeded to sell this stock to various and sundry persons. The records show that he has sold to such persons approximately 1240 shares, which if sold at the par value stated therein would amount to \$12,400. Kay claims that he had a right to sell this stock under the exemption provided in Section 5 (c) of Chapter 14899, Acts of 1931 as amended.

Investigation reveals that in making sales of this stock representations were made to prospective customers that the money being received from the sale of such stock was being used by the Corporation for the purpose of building a structure for the manufacture of the devices demonstrated. The customers were not advised that the stock offered for sale was the personal property of the said Kay and that the money received therefrom was going to him, but on the contrary that such funds were to be used for the benefit of the Company.

Under Section 5 (c), Chapter 14899, Laws of Florida, Acts of 1931, as amended, now Section 517.06 (3), Florida Statutes, 1941, are the facts as set forth above to be construed as an exempt transaction?

To Hon. J. Edwin Larson, Chairman, Florida Securities Commission:

Section 5 (c), Chapter 14899, Laws of Florida, Acts of 1931 as amended, now Section 517.06 (3) provides:

"(3) The sale of securities when made by or on behalf of a vendor not the issuer or underwriter thereof who being a bona fide owner of such securities, disposes of his own property for his own account, and such sale is not made, directly or indirectly, for the benefit of the issuer or an underwriter of such security, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of this chapter."

It is, therefore, my opinion that under the facts as summarized, the sale of the stock is not an exempt transaction as defined in the provision above set forth.

The intent of the Legislature in enacting the foregoing provision was clearly to exempt bona fide transactions of a private nature, and to prohibit the offering of large blocks of securities without complying with the provisions of the statute, which was designed to protect the interest of the public.

GASOLINE AND OIL INSPECTION

November 10, 1942.—042-513.

INSPECTION CHARGE—DEFINITION

QUESTION: Is the charge provided for by Section 525.09 Florida Statutes, 1941, (Section 3965 C. G. L.) an inspection fee or a tax?

To C. R. Tully, Captain A. G. D., State Procurement Officer, St. Augustine, Florida:

This section is a part of the Florida Gasoline and Oil Inspection Law, which was enacted for the purpose of protecting the public from inferior qualities of gasoline and oil and adulterations. The statute provides for inspection of all gasoline to be sold in the State of Florida, and provides

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for its analysis by the Department of Agriculture, and the fee provided for in Section 525.09 Florida Statutes, 1941 is for the purpose of defraying the expenses of such inspection.

It is therefore my opinion that this charge is in no sense a tax but is an inspection fee. This is in accord with an opinion rendered by a former Attorney General on January 25, 1934.

PUGILISTIC EXHIBITIONS

November 5, 1941.—041-635.

FLORIDA DEFENSE FORCE—AUTHORITY TO SPONSOR

QUESTION: (1) Is the Florida Defense Force authorized to conduct pugilistic exhibitions?

(2) Are the members of the Florida Defense Force exempt from jury duty?

To Hon. Vivian Collins, Adjutant General, State of Florida:

(1) Section 7186 of the Compiled General Laws provides certain penalties for engaging voluntarily in certain pugilistic exhibitions. Section 7188 of the Compiled General Laws Supplement provides that statutes such as this should not be construed to apply to boxing exhibitions held by and under the auspices of certain named organizations, including "companies or detachments of the Florida National Guard."

Chapter 20214, Laws of Florida, Acts of 1941, which act establishes the Florida Defense Force, provides in Section 1:

"Such forces shall be additional to and distinct from the National Guard and shall be known as the Florida Defense Force."

Therefore the Florida Defense Force is not authorized to conduct pugilistic exhibitions under these statutes.

(2) Section 13 of Chapter 20214, Laws of Florida, Acts of 1941, specifically provides:

"Every officer and enlisted man of such Force shall, during his service therein, be exempt from service upon any posse comitatus and from jury duty."

DOG AND HORSE RACING

February 7, 1941.—041-42.

FUNDS—DISPOSITION

QUESTION: Chapter 19386, Acts of 1939 provided in the distribution of the race track money, that \$4,000.00 be paid to the County Bond Trustees for the operating expense fund. Chapter 20182, Acts of 1939, provided for an election to abolish the Board of Bond Trustees of Union County, which resulted in the abolition of that Board. Should the aforesaid \$4,000.00 now be remitted to the Board of County Commissioners of said county?

To Hon. J. M. Lee, Comptroller:

I have examined Chapter 20182 which, as you have set forth, was passed by the same Legislature that passed Chapter 19386, providing for distribution of race track money, and I think that the Special Act should be read in *pari materia* with Chapter 19386. I find that under

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Dog and Horse Racing**

Section 2 of Chapter 20182, it is provided:

"That all of the powers, duties and privileges now exercised by or imposed upon the Board of Bond Trustees of Union County, Florida, under and by virtue of Chapter 11259, Laws of Florida, 1925, or any other valid and existing law, insofar as the same are not inconsistent with the existing law of the State of Florida relating to the duties and privileges of Boards of County Commissioners, are hereby conferred upon and invested in the Board of County Commissioners of Union County, Florida."

Reading the two Acts together, it was apparently the intention of the Legislature to place all of the powers, duties and privileges exercised by the Bond Trustees upon the Board of County Commissioners, provided the electors approved said Special Act, being Chapter 20182, and that upon such approval, the \$4,000.00 provided by said Chapter 19386, Acts of 1939, to the County Bond Trustees for the operating expense fund of said Bond Trustees, should now be paid to the Board of County Commissioners of said Union County, and that such payment should be made in accordance with our letter of January 19th, 1940.

DOG AND HORSE RACING

September 5, 1941.—041-504.

FUNDS—DISPOSITION

QUESTION: Where one Legislature directs that race track funds allocated to Gilchrist County be equally divided between the county school fund and the county commissioners after referendum, is that binding upon subsequent legislature so that the legislature could make no change in the disposition of this fund such as made by Chapter 21257, Acts of 1941, which provided for an equal distribution of the moneys received from the race track fund between the Board of Public Instruction and the County Commissioners except \$2000.00 of the money for the Board of Public Instruction was to be turned over to the Board of County Commissioners to establish a fund to be known as the Emergency Hospitalization Fund?

To Hon. Colin English, Superintendent of Public Instruction:

I am of the opinion that just because a previous Legislature had submitted the question of a division of this fund to a referendum of the people, same did not prevent the Legislature of 1941 from passing Chapter 21257, being House Bill No. 1785. Of course, it is obvious from what I have said that I am not passing upon the constitutionality of this Act.

DOG AND HORSE RACING

October 1, 1941.—041-558.

FUNDS—DISTRIBUTION TO PASCO COUNTY SCHOOL BOARD

QUESTION: (1) Can Pasco County School Board transfer money from its local school fund to the State Treasurer for credit to a special account for paying school teachers, to be repaid from the remaining balance received from the Race Track Fund Distribution under Special Acts of 1941, H. B. No. 572?

(2) Can this money transferred for deposit with the State Treasurer be drawn out by warrant transferring the money back to the local fund when the distribution of the Race Track Funds is made in January?

**REGULATIONS OF TRADE, COMMERCE AND INVESTMENTS—
Dog and Horse Racing**

(3) Can a bank make a loan against these anticipated receipts and be repaid by a school warrant drawn on the State Treasurer, when the Race Track Fund Distribution is made?

To Hon. J. Edwin Larson, State Treasurer:

(1) This question should be answered in the affirmative. It may be fairly implied from the Act that the Legislature contemplated that a temporary advancement could be made by the county school board from its current school fund to the special account with the State Treasurer established by the Act.

(2) This question must also be answered in the affirmative. The Act provides (Section 1, Chapter 20356, Special Acts, Laws of Florida 1941) "... that such ex-officio Treasurer shall pay out and disburse said funds solely upon proper warrants drawn by said Board of Public Instruction for the purpose of paying the salaries of teachers. . . ." Since the money advanced by the school board would be for the purpose of paying the salaries of teachers, a warrant drawn by the county school board, after the distribution of the race track funds, in order to transfer the money back to the county current school fund would actually be "for the purpose of paying the salaries of teachers."

(3) The County School Board may not borrow directly against anticipated receipts under the race track fund distribution, inasmuch as there does not appear to be any authority for such borrowing under Section 1084 of the Florida School Code as amended (Section 11, Chapter 20970, Laws of Florida 1941); however, sub-section (2) of this section does provide that a county board may borrow money to be retired from the county school tax at a rate of interest not to exceed six per cent per annum provided that the sum borrowed shall not be in excess of eighty per cent of the amount as estimated by them in the official budget for the current fiscal year to be available from the county school tax. Accordingly, a bank could make a loan against county current school funds arising from the county school tax, and such loan could be liquidated out of receipts under the race track fund distribution as set forth in my answer to your second question above.

EXPLOSIVES

May 21, 1941.—041-279.

**MANUFACTURER—LICENSE APPLICATION—INFORMATION
REQUIRED**

QUESTION: What information should be incorporated in forms to be submitted by manufacturers and dealers in explosives under the Florida Explosives Act, Chapter 20215, Acts of 1941?

To Hon. J. J. Gilliam, Director, Department of Public Safety:

Section 3 (a) of said Act states that applications for a license to manufacture explosives shall be made to the licensing authority upon forms as prescribed by the authority. The form should contain the request for the following information:

- (1) Name and address of applicant and his agents in this State;
- (2) Reason for desiring to manufacture explosives;
- (3) Citizenship, if applicant is an individual;
- (4) If applicant is a partnership, names and addresses of the partners, and their citizenship;

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Explosives**

(5) If applicant is an association or corporation, names and addresses of the officers and directors thereof, and their citizenship.

Section 3 (b) provides for application for license to engage in the business of dealing in explosives, and such application forms shall state, among other things, the following information:

- (1) Name and address of the applicant and his agents in this State;
- (2) The reason for desiring to engage in the business;
- (3) Citizenship, if an individual applicant;
- (4) If a partnership, names and addresses of the partners, and their citizenship;
- (5) If an association or corporation, the names and addresses of the officers and directors thereof, and their citizenship.

Section 3 (c) of said Act provides for an application for license to possess explosives, and the application shall be upon a form prescribed, which form shall state, among other things, the following:

- (1) Name and address of the applicant;
- (2) Reason for desiring the license;
- (3) His citizenship, if applicant is an individual;
- (4) If applicant is a partnership, names and addresses of the partners and their citizenship;
- (5) If the applicant is an association or corporation, the names and addresses of the officers and directors thereof, and their citizenship.

Section 4 of said Act makes provisions for the filing of reports and records with the licensing authority.

Section 4 (a) requires the manufacturer to file a report upon a form submitted by the licensing authority, at least once each calendar month, and included in said report must be the following information:

- (1) Names of all purchasers and consignees;
- (2) The amount and description of all explosives sold or delivered.

Section 4 (b) requires dealers to keep a record of all explosives purchased or sold by them, which records shall be furnished the licensing authority once each calendar month. The form shall be prepared by the licensing authority, and shall include, among other things, the following:

- (1) Name and address of each vendor or vendee;
- (2) The date of each sale or purchase;
- (3) The amount and kind of explosives sold or purchased.

The forms required by the Act must include the information mentioned hereinabove, and after you have prepared the layout of said forms, I will be pleased to approve same.

CHAPTER XXVI

LIQUORS AND BEVERAGES

BEVERAGE LAW; ADMINISTRATION

June 22, 1942.—042-311.

EXCISE TAX—MIXED BEVERAGES

QUESTION: Under sub-section b, section 2 of Chapter 20830, Acts of 1941, does the tax rate of 30c per gallon apply to mixed beverages of a spirituous base containing less than 14% by weight and commonly referred to in the State as "Tom Collins," "Gin Fizz," "Whiskey Sours?"

To Hon. E. W. Scarborough, Director, Beverage Department:

I have examined the section of the law above referred to and find that it applies to all beverages except malt beverages and natural sparkling wines containing more than 1% by weight and less than 14% by weight of alcohol.

Therefore, all beverages coming within said definition are taxable regardless of their trade names.

I am, therefore, of the opinion that the question submitted by you should be answered in the affirmative.

BEVERAGE LAW; ADMINISTRATION

February 13, 1941.—041-67.

EXCISE TAX—U. S. ARMY OFFICERS' CLUBS—EXEMPTION

QUESTION: Would the Beverage Department be entitled to collect excise tax from Officers' Clubs, Officers' Mess and Canteens selling alcoholic beverages in Federal areas?

To Hon. Thomas W. Long, Director, Beverage Department:

I am of the opinion that the institutions mentioned by you are not agencies or instrumentalities of the United States, and even though located and transacting the business of vendors of alcoholic beverages within a Federal area, are not exempt from the taxes imposed upon such business by the Laws of Florida.

Your attention is directed, however, to the distinction between excise and privilege or license taxes—the one applicable to manufacturers and distributors, the other to vendors. For the purpose of this opinion, I have assumed that the Clubs or Canteens in question are neither manufacturers nor distributors, as defined by law.

BEVERAGE LAW; ADMINISTRATION

July 29, 1941.—041-407.

LICENSES—CLUB—ISSUANCE IN DRY COUNTY

QUESTION: May a club license be issued in a dry county under sub-section X of Section 5, Chapter 16774, Acts of 1935?

LIQUORS AND BEVERAGES—Beverage Law; Administration

To Hon. E. W. Scarborough, Director, Beverage Department:

Inasmuch as Article XIX affects only the sale of intoxicating liquors, wines and beers; that there is no statute prohibiting the possession of tax paid liquors, except for the purpose of sale; that the statute in question provides for a special license to organizations described therein under which intoxicating liquors may be distributed to members and non-resident guests, and that such distribution shall not be deemed sales, I am of the opinion that the special license provided for in said statute may be legally issued to any organization within its purview and which may qualify thereunder located in a dry county, one of the important qualifications being that such organizations must have been in continuous active existence and operation for a period of not less than two years prior to date of application.

BEVERAGE LAW; ADMINISTRATION

March 10, 1941.—041-120.

LICENSES—INTOXICATING LIQUORS—SALE

QUESTION: When a drink of liquor is served just prior to the serving of a meal and the charge for same is placed on the check as a separate item from the price of the dinner, but is included in the total of the check, and when the check is paid the entire amount is rung up in the cash register of the restaurant as one item, does such transaction constitute a sale within the meaning of the Beverage Act, viz., Chapters 16774, Acts of 1935, 18015, Acts of 1937, and 19301, Acts of 1939?

To Hon. E. W. Scarborough, Director, Beverage Department:

You state:

"An opinion rendered by the Attorney General under date of February 20, 1935, RE: INTOXICATING LIQUOR BEVERAGE LICENSE FOR SELLING BEER AND WINE WHEN SERVED WITH MEALS, may partially answer this inquiry, but I suggest you refer to same."

I have referred to the opinion mentioned and I believe that your present statement of fact is much stronger than in the opinion mentioned. The last paragraph of said opinion gives a sufficient amount of information, I think, to determine the question submitted. It is:

"In view of the above, it is my opinion that a hotel serving wine or beer with meals and not charging more than the regular price for such meals when beer and wine are served therewith, is nevertheless selling or dealing in wine or beer and would be subject to a license therefor under Chapter 15884, Acts of 1933."

This opinion appears to me to be sound and as I have stated above, I think it is applicable to the question you have propounded.

I am, therefore, of the opinion that the transaction you mention constitutes a sale within the meaning of the Beverage Act.

BEVERAGE LAW; ADMINISTRATION

March 30, 1942.—042-146.

LICENSES—REVOCATION

QUESTION: What is the authority of the Director of the Beverage Department to revoke licenses of liquor dealers who allow prostitution to be practiced in or about their premises?

LIQUORS AND BEVERAGES—Beverage Law; Administration

To Hon. Hugh Culbreath, Sheriff, Hillsborough County, Tampa, Florida:

Section 1, Chapter 16774, Laws of Florida, Acts of 1935—Section 4151 (227) Compiled General Laws, Permanent Supplement—among other things, provides as follows:

"The director is hereby given full power and authority upon sufficient cause appearing of the violation by any licensee, whether convicted in a criminal court or not, of any of the laws of this State or of the United States or of his maintaining a nuisance or unsanitary premises, or engaging in or permitting disorderly conduct on the premises where such beverage business is conducted, to revoke the license of any licensee. Before the director shall revoke the license of any licensee, he shall give such licensee a written statement of such cause for revocation of license and a fair hearing, if the licensee shall demand a hearing. At such hearing, the licensee shall be entitled to produce witnesses and be represented by counsel. In order to permit a licensee, whose license shall be revoked, an opportunity to apply to the courts for relief, no revocation of license by the director shall become effective until ten days after such revocation but shall then become effective unless prevented by judicial action."

BEVERAGE LAW; ADMINISTRATION

December 1, 1942.—042-539.

LICENSES—REVOCATION—REISSUANCE

QUESTION: Is the Director of the Beverage Department, who has revoked a wine and beer license, correct in refusing to grant a license to some other person for the same location?

To Hon. Lloyd F. Boyle, Assistant State Attorney, Sanford, Florida:

I wish to advise that the section dealing with the revocation of a license is 561.29 Florida Statutes, 1941 and it authorizes the Director to revoke a license issued to any licensee for the causes therein mentioned.

Section 561.58 is the section that seems to give you some trouble. It reads:

"ISSUANCE OF LICENSE FOR A PRIOR LICENSE REVOKED.—When a license is revoked by the director under the authority granted in §561.29, it shall be unlawful for a license provided for in §§561.34-561.35 to be issued for the location of the place of business formerly operated under the revoked license for a period of two years from the first day of the succeeding October after such revocation."

You will note that any license provided for in sections 561.34 and 561.35 may be revoked. Section 561.34 provides for the tax. I quote sub-paragraphs one and two which seem to apply to wine and beer establishments:

"(1) Vendors who may sell only beverages containing alcohol of more than one per cent by weight and not more than three and two-tenths per cent by weight, in counties where the sale of intoxicating liquors, wines and beers is prohibited, fifteen dollars.

"(2) Vendors who may sell only beverages containing alcohol of more than one per cent by weight and not more than fourteen per cent by weight, and wines regardless of alcoholic content, in counties where the sale of intoxicating liquors, wines and beers is permitted, fifteen dollars."

LIQUORS AND BEVERAGES—Beverage Law; Administration

Apparently the Director is under mandatory duty to refuse to issue a new license for the same location after one has been revoked and you will note it makes it unlawful for him so to do.

I can, therefore, only come to the conclusion that the Director has no discretion in this matter and cannot issue a new license for the same location of the place of business formerly operated under the revoked license for the period of time mentioned in the statute.

BEVERAGE LAW; ADMINISTRATION

February 6, 1941.—041-40.

LICENSES—TRANSFER

QUESTION: Can a person holding a license from the City to engage in the business under Chapter 18015, Acts of 1937, transfer such license to the purchaser of such, where there is a City Ordinance that provides that such license cannot be transferred?

To Hon. O. S. Thacker, City Attorney, Kissimmee, Florida:

The only case I have been able to find that has been decided by our Supreme Court that is at all helpful is the case of Langston vs. Lundsford, 165 So. 898. This decision is to the effect that the City cannot impose by ordinance or otherwise any tax not authorized by Chapter 18015, Acts of 1937.

I call your attention to the fact that Section 12 of said Act specifically authorizes the City to levy a tax up to fifty per cent of the State and County license tax, and that the holder of such license is then credited with the amount he pays the City upon his State and County license tax, and that otherwise a municipality cannot by "charter, special or general law" levy a tax on licenses contrary to the provisions of said Act.

You will note that Section 6 provides:

"Licenses issued under the provisions of the Beverage Act of 1935 shall not be transferable except as follows . . ."

The conditions of such transfer then appear in the Act. They are to the effect that when a bona fide sale is made and the purchaser is satisfactory to the Board of County Commissioners and to the Director of the Beverage Department and possesses all of the qualifications required, that the transfer be made.

It would, therefore, seem to me that since the Beverage Act provides for transfer under the conditions mentioned that when same are met, a transfer must be made, any city ordinance to the contrary notwithstanding.

BEVERAGE LAW; ADMINISTRATION

November 17, 1941.—041-650.

LICENSE TAX—MUNICIPAL

QUESTION: Does Chapter 19768, Special Acts of 1939, creating the City of Daytona Beach, authorize the municipality to impose license taxes on vendors of intoxicating liquors in excess of 50% of the State and County tax?

LIQUORS AND BEVERAGES—Beverage Law; Administration

To Hon. E. W. Scarborough, Director, Beverage Department:

Chapter 16774, Laws of Florida, Acts of 1935, as amended and supplemented by Chapter 18015, Laws of Florida, Acts of 1937, known as the "Beverage Law" (Section 561.36, Florida Statutes, 1941) provides as follows:

"561.36 CITY LICENSE TAX.—Each incorporated city or town in the state may levy and collect a license tax on each manufacturer, distributor, vendor, caterer and club having a place of business or club house or club rooms within the corporate limits of such city or town not to exceed fifty per cent of the state and county license tax herein provided, but if such city or town provides and collects such license tax the manufacturer, distributor, vendor or club paying such license tax shall be entitled to a reduction in his state and county license tax of the amount so paid for such city or town license tax, upon exhibiting to the county tax collector a receipt for the payment of such city or town license tax. Such city or town license shall not apply to state and county licensees who shall have paid their state and county license tax before the ordinance providing for such city or town license tax shall have become effective.

"No tax on the manufacture, distribution, transportation, importation or sale of such Beverages shall be imposed by way of license, excise or otherwise, by any municipality, anything in any municipal charter, special or general law to the contrary notwithstanding, except as herein expressly authorized."

The Beverage Law was no doubt intended by the Legislature to be uniform in its application throughout the entire State. The express terms and precise language of this act can leave no doubt that the Legislative intent was to prohibit any municipality from levying a license tax in excess of fifty per cent of the state and county license tax. The Beverage Law is not a general occupational license tax law, but is a general law designed to cover the entire field of the regulation and taxation of the manufacture, distribution, and sale of beverages containing alcohol of more than one per cent. It was evidently intended to prescribe an exclusive State rule or policy, any and all local or special laws to the contrary notwithstanding.

In discussing the application of the above quoted section of the Beverage Law to a municipal ordinance adopted by the City of Panama City, Florida, which municipality attempted to impose a license tax upon a distributor having his principal place of business in another city but took orders and made deliveries in Panama City, the Supreme Court of Florida said:

"That provision disposes of this case, clearly showing the legislative intent that no such ordinance as the one here in question should be adopted or enforced by any municipality in the State." *Langston vs. Lundsford*, 165 So. 898.

The ordinance of Panama City was adopted subsequent to the passage of the Beverage Act of 1935, though its charter act was passed by the Legislature prior to that time.

The charter act creating the municipality of Daytona Beach became a law in 1939, subsequent to passage of the Beverage Law in 1937. Among the enumerated powers contained in this charter act is the following:

"To impose a license tax upon professions, businesses, and occupations carried on either wholly or in part within the municipality; and said municipality may determine the amount of such license tax independently of the amount imposed by the State of Florida."

LIQUORS AND BEVERAGES—Beverage Law; Administration

Section 185 of this Act repeals all laws or parts of laws in conflict therewith.

The Supreme Court of Florida said:

"The general rule that a general act will not be held to impliedly repeal or modify a special or local one is subject to the qualification that this rule does not apply where the general act is a general revision of the whole subject, or where the two acts are so repugnant and irreconcilable as to indicate a legislative intent that the one should repeal or modify the other. *Sanders vs. Howell*, 73 Fla. 563, 74 So. 802; *State vs. So. Land & Timber Co.*, 45 Fla. 374, 33 So. 999; *Stewart vs. DeLand-Lake-Helen Special Road & Bridge Dist.*, 71 Fla. 158, 71 So. 42; *State vs. Sanders*, 79 Fla. 835, 85 So. 333." *Langston vs. Lundsford*, *supra*.

The Beverage Law is a general revision of the whole subject of the manufacture, distribution, and sale of alcoholic beverages, and as the Supreme Court held in the *Lundsford* case, *supra*, it superseded the special act creating the City of Panama City to the extent of their inconsistency.

It would seem to necessarily follow, that a subsequent special act in order to nullify the provision of this comprehensive law, would have to contain some express provision clearly and unequivocally showing that such was the intent of the Legislature. Especially should this be true as to the Beverage Law, as by its terms the revenue of the state and county is reduced by the amount paid by a licensee to the city.

I am unable to find anything in the language of the special act creating the City of Daytona Beach that clearly shows that the Legislature intended to confer upon the City any greater authority than that granted all municipalities by the general provision of the Beverage Law.

As further evidence of the fact that the Legislature did not intend the special charter act of Daytona Beach to supersede the license provisions of the Beverage Law, by Chapter 20719, Laws of Florida, Acts of 1941, it re-enacted the Beverage Law as a part of Florida Statutes 1941, which is a general revision of the Statute Laws of Florida.

Therefore, Chapter 19768, Laws of Florida, Special Acts of 1939, creating the municipality of the City of Daytona Beach, Florida, does not supersede the license provisions of the Beverage Law, and any ordinance adopted by the City of Daytona Beach fixing a license fee or tax on vendors of alcoholic beverages containing more than one per cent, in excess of fifty per cent of the state and county license tax, is invalid.

BEVERAGE LAW; ADMINISTRATION

November 19, 1942.—042-522.

SUPERVISORS—SUBPOENA OF WITNESSES

QUESTION: Do supervisors of this department under authority granted them by the Beverage Act have authority to subpoena witnesses and place them under oath in connection with the enforcement of the Beverage Laws of this State?

To Hon. E. W. Scarborough, Director, Beverage Department:

I wish to advise that I have carefully examined the Beverage Act and do not find any specific authority for the supervisors of your department to subpoena witnesses and I do not believe general authority is sufficient to warrant such a procedure.

LIQUORS AND BEVERAGES—Beverage Law; Enforcement**BEVERAGE LAW; ENFORCEMENT**

August 25, 1941.—041-475.

BEVERAGE DEPARTMENT—APPROPRIATION OF CAR

QUESTION: Under Subsection (b) of Section 13 of Chapter 19301, Acts of 1939, has the State Beverage Department authority, after advertising a car, as required by law, to appropriate it for its own use without libeling the same?

To Hon. E. W. Scarborough, Director, Beverage Department:

You are advised that Subsection (d) of Section 13 of Chapter 19301, sets forth the circumstances under which your department may appropriate a car which has been seized under said Act, to its own use. These circumstances are that no claim had been interposed or bond given within the time specified in the notice required to be published under Subsection (b).

An actual sale of a car, whether of more or less value than \$1,000.00, appears not to be necessary, unless in pursuance of the judgment of a court of competent jurisdiction, made and entered under the provisions of Section 14 of said Act.

BEVERAGE LAW; ENFORCEMENT

June 29, 1942.—042-327.

BEVERAGE DEPARTMENT—SEIZURE OF CARS

QUESTION: Subsection (c) of Section 9, Chapter 19301, Acts of 1939, gives the Beverage Department authority to seize cars for violation of the liquor laws of this State. In the past it has been the policy of the department where the transporter of moonshine whiskey had no previous record or reputation as a bootlegger, to turn the car over to the finance company which financed the purchase of said car, with the understanding that such company would not permit the law violator to regain possession of the car, or to in any manner reimburse him for his equity in the car. They may do this under their contract. However, in some instances, the actual value of the car is more than the finance company's equity in it. Would it be legal for the Beverage Department to demand of the finance company the difference between the actual cash value of the car and the company's equity in same, if and when the car is turned back to the company by the department?

To Hon. E. W. Scarborough, Director, Beverage Department:

The only manner in which a car can be seized is fixed by Section 11 of Chapter 19301. Section 13 outlines the procedure in connection therewith. Subsection (c) of Section 13 provides for the filing of a claim by any one having an interest in the property and the posting of a bond. If this is done under Section 14 proceedings are then had in the Circuit Court in which any interested party may appear and prosecute any rights that he may have thereunder. There is no provision in the Act for any other type of procedure.

I am, therefore, of the opinion that it will not be legal for your department to proceed in the handling of a seized car in any manner other than that provided in the statute. Taking this view, it would, of course, not be proper for your department to demand of the finance company that they pay the difference between the actual cash value of the car and their equity in same, and thereupon turn the car back to the finance company.

LIQUORS AND BEVERAGES—Beverage Law; Enforcement**BEVERAGE LAW; ENFORCEMENT**

April 16, 1941.—041-199.

INTOXICATING LIQUORS—FORFEITURE

QUESTION: Under what conditions should intoxicating liquors be forfeited and destroyed?

To Hon. J. P. Ramsey, Sheriff, Alachua County, Gainesville, Florida:

The provisions of Sections 5482 and 5483, Revised General Statutes (Sections 7626, 7627, C.G.L.) provide for forfeiture proceedings against intoxicating liquors. In Section 5482 R.G.S. the forfeiture is in connection with the trial of the person arrested for violation of the liquor law and it provides that "it shall be the duty of the judge of the court trying the case . . . to issue to the sheriff of the county a written order adjudging and declaring such liquors . . . forfeited and directing such sheriff to destroy such . . . liquors." Under Section 5483 R.G.S. the forfeiture proceedings are not in connection with the trial of any person and are to be had only in the Circuit Court.

Whenever there is a conviction in the county judge's court of a person for violation of liquor laws and there is in evidence certain intoxicating liquors the county judge has the right and the duty under Section 5482 R.G.S. to declare such liquor forfeited and direct the sheriff to destroy such liquors in the presence of the Clerk of the Circuit Court.

BEVERAGE LAW; ENFORCEMENT

July 13, 1942.—042-368.

INTOXICATING LIQUORS—HOURS OF SALE

QUESTION: May hours unequivocally fixed by the legislature during which liquors may be dispensed outside of municipalities be changed by rules and regulations adopted and promulgated by a department of the government?

To Hon. Spessard L. Holland, Governor:

The legislature has plainly and unequivocally fixed the hours during which liquors may be dispensed outside of municipalities. The State Beverage Department is charged with the enforcement of such laws, but may not change or alter the same. The State Defense Council, of course, may suggest additional rules and regulations and both agencies may cooperate in the enforcement thereof, but neither of them, nor both of them acting in conjunction with each other, may, in the absence of legislation, change existing law.

The suggestion that the military and naval authorities interested have full power and authority by disciplinary measures to control to any reasonable extent, certainly as far as the civil authorities might be able to do, the patronizing by officers and enlisted men of liquor establishments, and the use of liquors among them, is not out of order.

BEVERAGE LAW; ENFORCEMENT

September 14, 1942.—042-441.

INTOXICATING LIQUORS—HOURS OF SALE

QUESTION: Does sub-section (k), section 11, Chapter 16774, Laws of Florida, Acts of 1935, prohibit the sale of beer and wine between the hours of twelve o'clock midnight Saturday and twelve o'clock midnight Sunday?

LIQUORS AND BEVERAGES—Beverage Law; Enforcement

To Hon. Sid M. Saunders, Constable, District No. 5, St. Petersburg, Florida:

Section 11 (k), of Chapter 16774, Laws of Florida, Acts of 1935, now Section 562.14 Florida Statutes, 1941, is as follows:

"SALE ON SUNDAY PROHIBITED; EXCEPTION; CITIES MAY REGULATE.—The sale of intoxicating liquors between the hours of twelve P.M., Saturday and twelve P.M. Sunday, is prohibited, except in incorporated cities and towns. Such incorporated cities and towns may, by ordinance or resolution, hereafter regulate or prevent such sales."

The language used in this section is clear and unambiguous, and in order to answer your question it is only necessary to determine the meaning of the term "Intoxicating Liquors."

I have previously held in two opinions, one dated October 13, 1941, and the other dated October 16, 1941, that "Intoxicating Liquors" means not only spirituous beverages but includes wine and beer containing more than 3.2% of alcohol by weight.

It is therefore my opinion, that Section 562.14 Florida Statutes, 1941, prohibits the sale of all alcoholic beverages containing more than 3.2% of alcohol by weight, between the hours of twelve P.M. Saturday and twelve P.M. Sunday, except in incorporated cities and towns.

BEVERAGE LAW; ENFORCEMENT

December 4, 1942.—042-540.

INTOXICATING LIQUORS—HOURS OF SALE

QUESTION: May a licensee, with a license to sell liquor, beer and wine, stay open after midnight Saturday to sell, provided he only sells beer of not more than 3.2 per cent?

To Hon. E. W. Scarborough, Director, Beverage Department:

In my opinion, any establishment licensed under the Beverage Act, which sells nothing except the beverages embraced therein, must close its doors at the hours specified under the law. It would not be legal for such a place to stay open simply for the purpose of selling alcoholic liquors, not deemed by law to be intoxicating, such as beer of less than 3.2 alcoholic contents.

This opinion is not applicable in its strict interpretation of the closing hour to establishments licensed as bona fide restaurants, or places with a beer and wine license that sell other merchandise, or a "juke" joint, operating under other than the strict Beverage Act license. The rule that would be applicable to these unincorporated places, with respect to closing, is not intended to be outlined or laid down herein.

BEVERAGE LAW; ENFORCEMENT

June 16, 1941.—041-336.

INTOXICATING LIQUORS—INTERPRETATION

QUESTION: What is the construction of the words: "intoxicating liquors," as used in Senate Bill 395 of the 1941 Acts, now Chapter 21001, Acts of 1941?

To Hon. E. W. Scarborough, Director, Beverage Department:

I have carefully examined Senate Bill 395. I find it is an Act relating to the sale of *intoxicating liquors* and throughout this Act the

LIQUORS AND BEVERAGES—Beverage Law; Enforcement

words "intoxicating liquors" are used with reference to the purposes sought to be accomplished by the Act.

This Act in short provides that there shall be a certain mark-up on the sale by the retailers of all intoxicating liquors. It is not a revenue measure. I find that the words "intoxicating liquors, wines and beers" have been defined by Section 13, Chapter 16774, Acts of 1935, being Section 4151 (239) of the Compiled General Laws of Florida of 1927, Permanent Supplement, as:

"All liquors, wines and beers containing more than 3.2 per cent of alcohol by weight shall be deemed and held to be intoxicating liquors, wines and beers. The sales of such intoxicating liquors, wines and beers in counties where their sale is prohibited shall be a violation of this Act. . . ."

I find that in many instances in this Act, reference is made to intoxicating liquors, wines and beers. For instance, in Section 11 (g), the words are used in this manner:

"It shall be unlawful for any licensee to sell, give, serve or permit to be served intoxicating liquors, wines or beers to persons under twenty-one years of age."

I talked to the proponents of Senate Bill 395 prior to its introduction in the Legislature and after said bill had passed both houses and in the Governor's Office for action, and I know that they had no intention of including within the terms of this bill anything other than intoxicating liquors. I am informed that this fact was explained to certain members of the Legislature and that the proponents of the bill in preparing the said bill used the words "intoxicating liquors" because they felt that since these words had been defined by the Act they would not include intoxicating beers or intoxicating wines.

I note that your Department has always "distinguished between expressions 'intoxicating liquors' and 'wines and beers.'"

I agree with your construction of the use of the language "intoxicating liquors" in Senate Bill 395 of the 1941 Laws, and, therefore, hold that this bill affects only intoxicating liquors and does not encompass intoxicating beers or intoxicating wines, and that it applies only to intoxicating liquors as defined by Section 13, Chapter 16774, Acts of 1935, being Section 4151 (239) Compiled General Laws, Permanent Supplement.

BEVERAGE LAW; ENFORCEMENT

October 16, 1941.—041-336-1.

INTOXICATING LIQUORS—INTERPRETATION

QUESTION: What is meant by the words "intoxicating liquors" under the Laws of Florida?

To Hon. E. W. Scarborough, Director, Beverage Department:

On June 16th last an opinion was prepared in this office addressed to you under the above caption, interpreting Senate Bill 395 of the 1941 Laws of Florida, now known as Chapter 21001, in its use of the term "intoxicating liquors."

Since that opinion on the necessity for interpreting the meaning of the term "intoxicating liquors" with respect to alcoholic content has again arisen in this office from a different aspect. It is believed that in the

LIQUORS AND BEVERAGES—Beverage Law; Enforcement

light of the facts before me at the time of the preparation of the opinion first referred to herein, the interpretation there given to the meaning of "intoxicating liquors" was reasonable and consistent.

However, in Section 2 of Chapter 21001, the Legislature, whether intentional or not, identified the term "intoxicating liquors" in its meaning with the definition given for such term in Chapter 16774, Laws of Florida, Acts of 1935, and this definition holds alcoholic beverages containing more than 3.2% of alcohol by weight, shall be deemed and held to be intoxicating liquors.

I have been called upon to give an opinion upon the meaning of the term "intoxicating liquors" in what is known as our State Child Labor Law (Chapter 20955, Acts of 1941), and insistence is being made from over the State that the same definition is applicable to the same term in these two different laws. Consistency would seem to require the acceptance of this urge and contention, and I am so doing, and as a consequence thereof, I am forced and do hereby so declare to hold that the opinion first referred to herein, rendered under date of June 16, 1941 is erroneous in its interpretation of what constitutes intoxicating liquors under the meaning of Chapter 21001, Acts of 1941, and that instead of holding that this fair trade law applies only to intoxicating liquors other than wines and beers whose alcoholic content is 3.2% of alcohol, I now hold that the same includes wines and beers along with other alcoholic beverages whose alcoholic content is more than 3.2% of alcohol.

I therefore give to you as my opinion that the expression "intoxicating liquors" means not only spirituous beverages, but includes malts or vinous beverages, that is, wine and beer, of alcoholic content above 3.2% wherever the same is used in Senate Bill 395, now known as Chapter 21001, Laws of Florida, Acts of 1941.

BEVERAGE LAW; ENFORCEMENT

August 21, 1942.—042-409.

INTOXICATING LIQUORS—SALES IN DRY COUNTY

QUESTION: May the sheriff of Walton County enforce an ordinance passed by the City Council of DeFuniak Springs, Florida, prohibiting the sale of beer within said city from midnight Saturday until midnight Sunday? Walton County is a dry county.

To Hon. R. E. Gatlin, Sheriff, Walton County, DeFuniak Springs, Florida:

Section 568.02, Florida Statutes, 1941, provides:

"It is unlawful for anyone to sell, or cause to be sold, any intoxicating liquors, wines or beer in any county that has voted against the sale of intoxicating liquors, wines, or beer."

Intoxicating liquors, wines or beer is by statute defined to be any such beverage that contains more than 3.2% of alcohol by weight.

It is not necessary that you lean for support upon any city ordinance in order to cope with the sale of intoxicating beverages anywhere, at any time, within your county. If there are those in your county who are engaged in the sale of intoxicating beverages, as herein defined, they are subject to arrest and prosecution under the statute above quoted, regardless of whether such sale is made within or without the limits of an incorporated city.

LIQUORS AND BEVERAGES—Beverage Law; Enforcement**BEVERAGE LAW; ENFORCEMENT**

August 21, 1941.—041-465.

INTOXICATING LIQUORS—SALE TO MINORS

QUESTION: Does Chapter 20838, Acts of 1941, prohibit anyone under the age of eighteen years from going into a drug store, restaurant, or hotel dining room and purchasing meals provided such places sell intoxicating beverages and a dance hall is operated in connection therewith?

To Beverage Department:

If a drug store, restaurant, or hotel dining room sells intoxicating beverages and a dance hall is operated in connection therewith, the law does prohibit a minor under eighteen years of age from patronizing, visiting, or loitering in any such dance hall or restaurant, drug store, or hotel dining room, unless such minor is attended by one of his or her parents or by his or her natural guardian.

My reason for so ruling is because the intent of the Act is to regulate dance halls when the same are operated in connection with any place of business where intoxicating liquors are sold. It may be well to call your attention to close questions that may arise under the enforcement of the Act.

Such questions as: Is the place, operated in connection with the place of business, a dance hall? And such questions as: Is the place operated *in connection with* the place of business? It may also be well to give you some of the definitions of the term "dance hall." The following definitions will be found in WORDS AND PHRASES, Permanent Edition, Volume 11:

"A 'dance house' or 'dance hall' is place maintained for promiscuous and public dancing, the rules for admission to which are not based upon personal selection or invitation." State vs. Loomis, 242 Pac. 344.

"'Dance hall' as contemplated by Municipal law regulating building used for, would be public hall specifically devoted to dancing not necessarily used exclusively for dancing, but primarily and predominantly so used." People ex rel. Pershing Palace vs. Dever, 237 Ill. App. 65.

"A restaurant proprietor who permitted dancing incidentally to serving of meals was not operating a 'public dance' or conducting a 'dance hall' within ordinance requiring license, in absence of inclusion of such entertainment in definition of terms in ordinance." Cosmos vs. City and County of Denver, 70 Pac. 2d 341.

"Rev. Laws 1905, §4936, provides that one who permits any person under the age of 21 years to be or remain in a dance house owned, kept, and managed by him shall be guilty of a misdemeanor but does not define a 'dance house.' Held, that the term must be construed, in accordance with its ordinary usage, as a place maintained for promiscuous and public dancing, the rule of admission to which is not based upon personal selection or invitation." State vs. Rosenfield, 126 N. W. 1068.

"Premises intended to be used as restaurant, having total area of 16,000 square feet, but in which dancing is to be permitted as incident to restaurant business, space to be used for dancing in central portion of main floor being only 1,500 square feet, is not 'dance hall,' within meaning Chicago Municipal Code 1922, c 17, art. 3, §448, cl. (j), and city authorities are not justified in refusing petitioner license solely on ground that premises do not comply with requirements for dance halls." People vs. Dever, 237 Ill. App. 65.

LIQUORS AND BEVERAGES—Beverage Law; Enforcement**BEVERAGE LAW; ENFORCEMENT**

August 25, 1941.—041-473.

INTOXICATING LIQUORS—SALE TO MINOR—PROSECUTION PROCEDURE

QUESTION: A negro woman has been arrested and committed to jail, charged with selling intoxicating beverages to a person under twenty-one years of age, she acting for a brother who is a licensee, but now in service with the Army of the United States. How may this woman be informed against?

To Hon. E. W. Scarborough, Director, Beverage Department:

It is my opinion that the act, as stated by you, is an offense, whether by a licensee or a non-licensee, since the selling of liquor by the latter is an offense in any event. Therefore, it is my suggestion that the complaint, information or indictment be in two counts, charging a sale, by a licensee to a minor, upon the theory that the person making the sale is the agent of the licensee, in the one count; and in the other count charging a sale of liquor by a person not holding a license.

BEVERAGE LAW; ENFORCEMENT

May 5, 1941.—041-236.

PORT WINE—SALE TO MINOR—PROSECUTION PROCEDURE

QUESTION: What procedure should be followed in prosecuting a man, not a licensee under the Beverage Act, who sold Port Wine to a fifteen year old boy?

To Hon. M. A. Rosin, Prosecuting Attorney, Arcade Building, Arcadia, Florida:

Chapter 16774, Laws of Florida, Acts of 1935, provides in Section 11 not only that a sale can not be made by a licensee to a minor (Subsection g), but it also prohibits any sale except by a licensee (Subsection b). Under this act, therefore, the sale mentioned by you was either a violation of Subsection (b) because the seller did not have a license or was a violation of Subsection (g) because the seller was an employee of the licensee acting for the licensee in making the sale to the minor.

BEVERAGE LAW; ENFORCEMENT

August 18, 1941.—041-448.

STILLS—POSSESSION

QUESTION: Where a still and mash have been captured and no whiskey or moonshine seized in connection therewith, is the mere possession of a still and mash a felony or misdemeanor?

To Hon. E. W. Scarborough, Director, Beverage Department:

Your attention is directed to the provisions of Section 9-A, Chapter 19301, Acts of 1939, wherein it provides:

"It shall be unlawful for any person to have in his possession, custody or control, or to own, make, construct or repair any still, still piping, still apparatus or still worm, or any piece or part thereof, designed or adapted for the manufacture of an intoxicating beverage containing more than 1% of alcohol by weight, upon which a tax would be imposed by the Beverage Act, or to have in his possession, custody or control any receptacle or container containing any mash, wort or wash or other fermented liquids whatever capable of being distilled or manufactured into an intoxicating beverage containing more than 1% alcohol by weight,

LIQUORS AND BEVERAGES—Beverage Law; Enforcement

upon which a tax would be imposed by the Beverage Act, unless such possession, custody, control, ownership, manufacture, construction or repairing be by or for a licensee licensed under the Beverage Act to manufacture such intoxicating beverage."

Your attention is also called to Section 15 of Chapter 16774, Acts of 1935, as amended by Section 3 of Chapter 19301, Acts of 1939, reading as follows:

"Any person wilfully and knowingly making any false entries in any records required under the Beverage Act, or wilfully violating any of the provisions of the Beverage Act, concerning the *excise tax* herein provided for shall be guilty of a felony and shall upon conviction thereof be punished by imprisonment in the State Penitentiary for a term of not less than one year or more than five years or by fine of not more than \$5,000.00, or by both such fine and imprisonment. Any person violating any other provision of the Beverage Act shall be guilty of a misdemeanor and shall upon conviction be punished by imprisonment in the County Jail for not more than six months or by fine of not more than \$500.00, or by both such fine and imprisonment. Provided that any person, who shall have been convicted of a violation of any provision of the Beverage Act shall thereafter be convicted of a further violation of the Beverage Act, shall, upon conviction of said further offense, be deemed guilty of a felony and shall be punished by imprisonment of not less than one year nor more than five years in the State Penitentiary or fined not more than \$5,000.00 or both such fine and imprisonment." (*Italics supplied.*)

Whether or not the possession of a liquor still is a felony or a misdemeanor must be determined by the construction placed upon the phrase "concerning the *excise tax* herein provided for." The Supreme Court of Florida in the case of *Rhynes vs. State*, 195 So. 137, Text 138, held:

"So, while broadly speaking, a license tax or occupation license tax is an excise tax, we must hold that the language found in Section 15 of Chapter 16774, *supra*, viz: 'Concerning the excise tax herein provided,' applies to the provisions of the act in regard to stamp tax and not to the state and county occupation license tax."

It is my opinion that the mere possession of the liquor still by one other than a licensee licensed under the Beverage Act to manufacture intoxicating liquor is a misdemeanor, unless such person had previously been convicted of a violation of said Act, in which event the unlawful possession of a liquor still by him would constitute a felony.

BEVERAGE LAW; ENFORCEMENT

September 15, 1942.—042-442.

STILLS—SEIZURE AND FORFEITURE—PROCEDURE

QUESTION: What is the proper procedure to be taken to forfeit stills and moonshine whiskey seized by sheriffs and their deputies while making raids, when there is neither a supervisor of the State Beverage Department nor an investigator of the Federal Alcohol Tax Unit present?

To Hon. E. W. Scarborough, Director, Beverage Department:

The procedure, with reference to forfeiture, is fully provided by Section 562.27, et seq., of the Florida Statutes, 1941. These sections seem to contemplate that a sheriff or deputy may seize such property, as mentioned by you, to the same extent as you or any supervisor could and that the sheriff would report such seizure to you, together with a description of all the property seized, Section 562.38.

LIQUORS AND BEVERAGES—Beverage Law; Enforcement

The actual forfeiture proceedings are then taken under Sections 562.39 and 562.42 and, under certain conditions, the seizing officer can proceed under Section 562.42.

BEVERAGE LAW; ENFORCEMENT

February 6, 1941.—041-37.

VIOLATIONS

QUESTION: Is a violation of Sections 4151 (271-d) and (271-e) Compiled General Laws, Permanent Supplement 1940, a felony or a misdemeanor?

To Hon. Reeves Bowen, County Judge, Chipley, Florida:

In the case of Coleman, Sheriff, vs. State ex rel. Wilson, 190 So. 610, the Court had this question before it:

"In prosecution for unlawfully possessing alcoholic beverage containing more than 1% of alcohol by weight upon which a federal excise tax had not been paid, a sentence of imprisonment by confinement at hard labor in the state penitentiary for a term of six months, was unauthorized under statute concerning offense in question which provided that it should be punishable as a misdemeanor in view of statute providing that punishment for misdemeanors not otherwise provided for should be by fine not exceeding \$200 or imprisonment not exceeding 90 days or both. Comp. Gen. Laws 1927; Sec. 7104; Acts of 1937, Chapter 18015, Sections 4, 14."

In the case of Kennedy vs. State, 191 So. 193, the Supreme Court had before it an information charging Defendant with having in his possession, custody and control, whiskey without the immediate container thereof having affixed thereon Florida excise stamp tax as required by law. The defendant was sentenced to pay a fine of \$500 and costs or serve ninety days in jail in lieu thereof and one year at hard labor in the State prison. The Court affirmed this conviction and while the specific question as to the sentence was not raised, the Supreme Court did say that it found no error on record. Apparently the question was not raised in the Coleman case, yet the Supreme Court held, as I have pointed out, that the punishment was excessive and should have been for a misdemeanor.

Section 7105, Compiled General Laws, 1927, defines a felony as being any crime punishable by death, or imprisonment in the State prison. Every other offense is a misdemeanor.

So, in view of the sentence that was imposed in the Kennedy case which was a violation of Section 4151 (271-e), apparently the proper sentence would be for a felony.

I also call your attention to the case of Rhynes vs. State, 195 So. 137, where the Supreme Court said:

"So, while broadly speaking, a license tax or occupation license tax is an excise tax, we must hold that the language found in Section 15 of Chapter 16774, supra, viz: 'Concerning the excise tax herein provided,' applies to the provisions of the act in regard to stamp tax and not to the state and county occupation license tax."

The Supreme Court held that for failure to have a State and County occupation license tax to sell beverages, such person was guilty of a misdemeanor.

CHAPTER XXVII

AGRICULTURE, HORTICULTURE AND ANIMAL INDUSTRY

FERTILIZERS

April 17, 1942.—042-195.

INSPECTION FEE—WAIVER

QUESTION: Has the Commissioner of Agriculture authority to waive the inspection fee provided for by Chapter 16999, Acts of 1935, on dolomitic limestone and phosphate and liming materials purchased from manufacturers in Florida by the Agricultural Adjustment Administration for delivery to farmers to be used for agricultural purposes?

To Hon. Nathan Mayo, Commissioner of Agriculture:

Section 9 of Chapter 16999, Laws of Florida, Acts of 1935, provides that:

"Every manufacturer or agent for commercial fertilizer shall pay to the State Treasurer a fee of 25c per ton for commercial fertilizer offered for sale in the State of Florida, except raw ground phosphate rock, soft phosphate, colloidal phosphate, phosphatic clays and all other untreated phosphatic materials, peat or humus, and hydrated lime and limestone when sold or used for agricultural purposes, on which materials the fee shall be 10c per ton. 5c out of each fee so paid shall be placed into a special fund and not into the general inspection fund of the State, and said special fund shall be available to the Commissioner of Agriculture for use in enforcing this law. Provided that when the manufacturer shall have paid the fee herein named for any person acting as agent or seller for any manufacturer, the agent or seller shall not be required to pay the fee named in this Section; and any manufacturer who shall fail to pay the fee provided in this Section shall, upon conviction therefor, be fined not less than \$100.00 (One Hundred Dollars) nor more than \$500.00 (Five Hundred Dollars) for each offense. This Section shall not be construed as applying to sales of commercial fertilizer by one manufacturer to another."

The provisions of this section requiring the manufacturer or agent for commercial fertilizer to pay an inspection fee are mandatory, and the Commissioner of Agriculture is not authorized to exempt any particular manufacturer or agent from the payment of such fee. No authority is specifically given the Commissioner of Agriculture to waive the payment of these inspection fees, and it is a well settled principle of law that public officers must obey a law found upon the Statute Books until it has been judicially passed upon and determined to be invalid.

46 Corpus Juris, Section 305, page 1036.

State ex rel. Atlantic Coast Line R. Co. vs. State Board of Equalizers, 94 So. 681, 84 Fla. 592.

Therefore you are not authorized to waive the inspection fee on fertilizer secured by the Agricultural Adjustment Administration from manufacturers in Florida for delivery to farmers to be used for agricultural purposes.

**AGRICULTURE, HORTICULTURE AND ANIMAL INDUSTRY—
State Plant Board****STATE PLANT BOARD**

February 28, 1941.—041-104.

RULES AND REGULATIONS

QUESTION: Do Rules 41 A-1, 41 A-2, and 41 I adopted by the State Plant Board February 7, 1941 comply with Chapters 12050 and 12291, Acts of 1927, and Chapter 19062, Acts of 1939?

To Hon. J. T. Diamond, Secretary, State Plant Board:

In my opinion these rules are in accordance with Chapters 12050 and 12291, Acts of 1927, and Chapter 19062, Acts of 1939, under which the State Plant Board is operating.

In the application of Rule 41 I, however, I recommend, when any bees and used beekeeping equipment in the hands of the possessor are held, that they be held only when there are reasonable grounds to believe that the bees or equipment are infected with a contagious or infectious disease.

STATE LIVE STOCK SANITARY BOARD

August 8, 1941.—041-438.

**ANTI-HOG CHOLERA SERUM—DEPOSIT AND DISBURSEMENT OF
PROCEEDS OF SALE**

QUESTION: (1) The State Live Stock Sanitary Board is now distributing cost price anti-hog cholera serum and hog cholera virus as directed by Chapter 20733, Acts of 1941. May the proceeds from these sales be deposited in the State Treasury under authority of Section 3, Chapter 20357, Acts of 1941?

(2) May such money so deposited be disbursed by State Warrant for the purchase and distribution of additional amounts of anti-hog cholera serum and hog cholera virus?

To Dr. J. V. Knapp, State Veterinarian:

Section 24 of Article IV of the Constitution of Florida provides:

"Section 24. The Treasurer shall receive and keep all funds, bonds, and other securities, in such manner as may be prescribed by law, and shall disburse no funds, nor issue bonds, or other securities, except upon the order of the Comptroller, countersigned by the Governor, in such manner as shall be prescribed by law."

Section 165, Compiled General Laws, 1927, provides:

"165. Moneys paid on warrants.—The Treasurer shall pay all warrants on the treasury drawn by the Comptroller and countersigned by the Governor, and no moneys shall be paid out of the treasury except on such warrant."

(1) It is my opinion that proceeds received from the sales of the anti-hog cholera serum and hog cholera virus, as authorized and directed by Chapter 20733, Laws of Florida, Acts of 1941, are State funds, which you not only may, but which, under said Section 24 of Article IV of the Constitution, you are required to deposit in the State treasury.

(2) It is my further opinion that under the foregoing Constitutional and statutory provisions, said funds can be disbursed only by the State Treasurer on the order or warrant of the Comptroller, countersigned by the Governor; and that Chapters 20357 and 20733, Acts of 1941, author-

**AGRICULTURE, HORTICULTURE AND ANIMAL INDUSTRY—
State Live Stock Sanitary Board**

ized your Board to use the proceeds of such sales for the purchase and distribution of additional amounts of anti-hog cholera serum and hog cholera virus.

BOARD OF FORESTRY

February 4, 1942.—042-75.

FIRE WARDENS—ARRESTS WITHOUT WARRANT

QUESTION: Have State-wide fire wardens appointed by the Florida Forest and Park Service authority to arrest without warrant and take before the proper authority for prosecution any individual who is caught in the direct act of burning the woods in violation of the forestry laws?

To Florida Forest and Park Service:

There is no statute conferring authority upon employees or agents of the Florida Board of Forestry and Parks to make arrests either with or without warrant. The mere fact that the statutes charge the fire warden with the prosecution of the forest protective laws does not of itself authorize him to make arrests for violations.

Your fire warden, upon observing a violation of any of the forestry laws of the State of Florida, should immediately ascertain the name of the person violating the same and the names of any witnesses or persons who also observed the violation, and forthwith go before the county judge or some justice of the peace and procure a warrant of arrest for the violator and deliver the same to the sheriff or constable together with such information as he may have concerning the place of residence or whereabouts of the person for whom the warrant is issued.

BOARD OF FORESTRY

December 28, 1942.—042-579.

MYAKKA RIVER STATE PARK—VENEREAL DETENTION CAMP

QUESTION: (1) What is the legal effect of the provision contained in the deed of conveyance from the trustees under the last will and testament of Bertha Honore Palmer, deceased, dated October 3, 1934, and recorded in deed book 129 at page 156 of the public records of Sarasota County, Florida, conveying about 1900 acres of land in the said Myakka River State Park, which provides that the lands were conveyed, "upon the express condition as a covenant running with the land that the premises conveyed shall be used only as a state park and/or game preserve and for no other purposes and upon ceasing to be so used in whole or in part this conveyance becomes and remains void and of no effect against the parties of the first part, and the title to said premises shall thereupon, revert to said parties of the first part with the right to reenter and repossess the same as of their first and former estate"?

(2) Would the use of said premises or any part thereof as a venereal detention camp be a violation of the above quoted provision contained in the deed?

To Florida Forest and Park Service:

(1) Restrictions on the use of lands are not favored at law, but where the intention of the parties is clear in their creation and are within reasonable bounds and not against public policy, they will be upheld (26 C. J. S. 508, Section 162). Although the conveyance above

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Board of Forestry**

mentioned was not signed by the grantees it is binding upon them and creates an enforceable covenant, the acceptance of the conveyance effected the agreement (14 Am. Jur. 611, Section 196). The above mentioned lands were acquired by the trustees by donation pursuant to Chapter 16142, Laws of Florida, Acts of 1933 (19 Minutes of Trustees, 769-773), which act does not prohibit restrictions such as were contained in the deed aforesaid. The donation of the lands to the state or some of its agencies for use as a park or game preserve and for no other use does not seem to be against public policy, especially where the same was without cost to the state or to its agencies; the state has invested no money in the purchase of these lands, only in their improvement. I am, therefore, of the opinion that the restrictions placed upon the lands by the grantors are within reasonable bounds and not against public policy and must be complied with. A breach of such restrictions would either make the lands subject to reentry by the grantors as provided in the conveyance, or subject the Trustees of the Internal Improvement Fund and the Florida Board of Forestry and Parks to an injunction to prohibit the violation. I am inclined to think that the right of reentry would exist; however, I do not think it necessary that that point be decided now.

(2) The restrictions in the conveyance confine the use of the lands to state parks or game preserve purposes. The use of the land as a venereal detention camp would clearly not be for game preserve purposes and would not seem to be for park purposes either. No such use of the parks seems to have been contemplated by any of the statutes of this state relating to parks. The general definition given to the word "park" seems to relate to premises set apart for pleasure, exercise, amusement, and the like (Black's Law Dictionary, 3rd Ed. 1325). I am, therefore, of the opinion that the use of the premises or any part thereof as a venereal detention camp would be a violation of the restricted use of the premises fixed by the conveyance above mentioned.

BOARD OF FORESTRY

October 27, 1942.—042-500.

**STATE AGENCY—LIABILITY FOR PERSONS INJURED IN STATE
PARKS**

QUESTION: Would the Florida Board of Forestry and Parks be liable in the event a person was injured while a patron in one of our State Parks?

To Florida Forest and Park Service:

Suits for damages cannot be maintained against the Florida Board of Forestry and Parks or any of its agencies, they being "state agencies." The state and its agencies can only be sued when authorized by statutes constitutionally enacted; there is no statute authorizing suits against the Florida Board of Forestry and Parks or any of its agencies or against the state in connection with said board and its agencies. *State vs. Atkinson*, 136 Fla. 528, 188 So. 834, text 838; *Kennard vs. State Tuberculosis Board*, 129 Fla. 619, 176 So. 872, text 874-5. This seems to be a complete answer to the question propounded. This opinion does not cover the question of the personal liability of officers or agents employed by the Florida Board of Forestry and Parks for negligence in the performance of their duties in connection with the parks.

**AGRICULTURE, HORTICULTURE AND ANIMAL INDUSTRY—
Board of Forestry****BOARD OF FORESTRY**

August 19, 1941.—041-461.

TOWER SITES—ACQUISITION

QUESTION: Under Chapter 20900, Acts of 1941, has the Florida Board of Forestry and Parks the authority to acquire tower sites, which is a part of the Board's activity in providing detection service exclusively for forestry works?

To Hon. H. J. Malsberger, State Forester, Florida Forest and Park Service:

Section 1 of Chapter 20900 provides:

"That whenever the 'Florida Board of Forestry' shall find it necessary to acquire private property for state parks, state forests or rights of way for state park or state forest roads, or for exercising any of the powers and duties authorized and prescribed by law to be exercised and performed by the 'Florida Board of Forestry,' the said 'Florida Board of Forestry' is hereby empowered and authorized to exercise the right of eminent domain and to proceed to condemn said property in the same manner as provided by law for the condemnation of private property by counties."

In my opinion the Florida Board of Forestry and Parks would be empowered to acquire tower sites under this Chapter.

FORESTRY DEVELOPMENT

November 4, 1941.—041-632.

COMMUNITY FOREST ACTS—ACQUISITION OF MURPHY LANDS

QUESTION: Is the Town of Astatula, Florida authorized to acquire forestry lands, title to which has vested in the State by virtue of the Murphy Act, for certain purposes?

To Hon. H. J. Malsberger, State Forester:

Chapter 20902, Laws of Florida, Acts of 1941—the Community Forest Act—is an Act empowering counties, cities, towns or school districts to acquire, protect, reforest, manage and utilize lands for forest and related purposes. Said Act provides:

"Section 4. All counties, cities, towns or school districts, through their governing boards, are hereby empowered to establish, from land owned by such county, city, town or school district in fee simple, or to acquire by purchase or gift, lands at present covered with forest or tree growth, or suitable for the growth of trees, and to administer the same under the direction of the State Forester, of the State of Florida, in accordance with the practice and principles of scientific forestry, for the benefit of the said counties, cities, towns or school districts. . . ."

"Section 5. The Department of Agriculture, Division of Lands, Comptroller, the Trustees of the Internal Improvement Fund, counties, cities, towns and school districts or any other public agency holding fee simple or tax certificate lands are hereby empowered to, and may upon application to them, transfer title of fee simple lands not in other public use to any county, city, town or school district for forest purposes as described under this Act, provided such lands are approved by the State Forester for this purpose."

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It is my opinion that by virtue of the foregoing statutes, the Town of Astatula, Florida, is authorized to acquire lands within its corporate limits, which reverted to the State under the Murphy Act, for forestry purposes.

In this connection I would recommend that the Town of Astatula make an application to the Trustees of the Internal Improvement Fund, referring to the aforementioned Community Forest Act, setting forth by detailed description the lands which it seeks to acquire and that such application be accompanied by a certificate or instrument in writing by your Department approving of the purposes for which said lands are to be acquired; and inquiring as to the terms and conditions upon which the Trustees will sell and make conveyance of said lands to the Town of Astatula, Florida.

FLORIDA CITRUS COMMISSION

March 22, 1941.—041-161.

POWERS

QUESTIONS: (1) May the Florida Citrus Commission contract for manufacturing and the payment of royalties on citrus juice extractors to be given to the consuming public in the form of advertising of the Florida citrus fruit?

(2) May the Florida Citrus Commission contract for the manufacturing and selling to the citrus consuming public of citrus juice extractors to be used solely for advertising the Florida citrus fruit?

(3) Does the State Comptroller have the authority to disburse Florida Citrus Commission funds that may accrue under the above mentioned contract?

To Hon. J. M. Lee, Comptroller, Attention Hon. Harry J. Chance,
Assistant Comptroller:

The Florida Citrus Commission was created by Chapter 16854, Laws of 1935, as a corporate body with power to contract and be contracted with.

The fundamental purpose of Chapter 16854, Laws of 1935, was to promote the general welfare of the Florida Citrus Fruit Industry, it being recognized by the Legislature that the citrus fruit crop grown in Florida comprises the major agricultural crop of this State and the business of disposing of such crop is a matter of public interest.

Among the specific powers and duties delegated to and imposed upon the Commission by Chapter 16854, Laws of 1935, are the following:

(1) To act as the general supervisory authority over the administration and enforcement of this Act and the provisions thereof and to exercise such other powers and perform such other duties as may be imposed upon it by other laws of the State of Florida.

The Legislature, by Chapter 16857, Laws of 1935, and by Chapter 17780, Laws of 1937, in an effort to conserve and promote the prosperity and welfare of the Florida Citrus Industry and of the State of Florida, by promoting the sale of grapefruit produced in Florida, authorized the conducting by the Florida Citrus Commission of a publicity, advertising and sales promotion campaign to increase consumption of such grapefruit.

In the last two Acts mentioned, it is provided:

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Florida Citrus Commission**

"That the Commission shall plan and conduct a campaign for commodity advertising, publicity and sales promotion to increase the consumption of grapefruit and may contract for any advertising, publicity and sales promotion service. To accomplish such purpose the Commission shall have power and it shall be the duty of the Commission . . .

"(j) To decide upon some distinctive and suggestive trade mark and to promote its use in *all ways* to advertise Florida citrus fruits."

This Act further provides that the powers and duties of the Commission shall include the following:

(1) To make in the name of the Commission such advertising contracts and *other agreements as may be necessary.*

(2) To purchase or authorize the purchase of all office equipment and supplies and *to incur all other reasonable and necessary expenses and obligations in connection with and required for the proper carrying out of the provisions of this Act.*

These particular acts likewise authorize the levying and collection of taxes, payment of which is to be evidenced by stamps known and designated as "Grapefruit Advertising Stamps."

All taxes levied and collected under said Acts are paid into the State Treasury and kept in a special fund known as the "Grapefruit Advertising Fund" and all moneys coming into said fund are by the Act appropriated and made available for defraying the expenses of the administration and enforcement of said Act. All money levied and collected under the Act, over and above the necessary administrative expenses, is to be spent exclusively for the advertising of grapefruit, except that in cases where grapefruit is advertised jointly with tangerines, oranges or both such tangerines and oranges, the Grapefruit Advertising Fund shall only bear its pro-rata share of such joint advertising.

Chapter 16856, Laws of 1935, and Chapter 17781, Laws of 1937, contain similar provisions with reference to oranges as the above mentioned Acts contain with reference to grapefruit.

Chapter 16858, Laws of 1937, and Chapter 17782, Laws of 1937, are likewise similar Acts relating to tangerines.

In construing the foregoing Acts with reference to the legality of the taxes levied thereunder, the Supreme Court of Florida in the case of *C. V. Floyd Fruit Company vs. Florida Citrus Commission*, 175 So. 248, said:

"The Act here involved is one of a series of legislative Acts passed for the benefit of the citrus fruit industry of Florida, being Chapters 16854 to 16862, both inclusive, of the session of 1935. The Acts were designed to regulate the marketing of citrus fruits. A Citrus Commission was created and provisions were made for the inspection, grading and processing of citrus fruit to the end that the marketing of immature or unfit fruit may be prevented, and provision was also made for advertising Florida citrus fruit, that the buying public might be informed of the superior quality of citrus fruits being marketed from Florida, that the demand therefor might be increased thereby."

In the same case, the Court went on to say:

"It cannot be reasonably contended that the protection and promotion of the citrus industry in Florida is not a matter of public concern or that the Legislature may not determine within reasonable bounds

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Florida Citrus Commission**

what is necessary for the promotion of that industry. We are committed to the theory that advertising is a proper method for promoting the public welfare and that, therefore, the tax levied to provide funds for advertising serves a public end.

"The purpose of the levying of the tax and the purpose for which the tax is appropriated are legitimate."

In the case of *McCulloch vs. Maryland*, 4 Wheat. 316, 421, 4 L. Ed. 579, 605, the United States Supreme Court said:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

And so it is that the Legislature has, by enactment of the various statutes aforesaid, vested broad and discretionary powers in the Florida Citrus Commission to the end that the Commission may carry on and conduct a publicity, advertising and sales promotion campaign to increase the consumption of Florida citrus fruit.

All of the foregoing legislative enactments contain the express provision that they shall be liberally construed.

In this highly competitive era it has become a common practice, under modern advertising systems and methods, wherever possible and practicable, to supplement descriptive advertising by the gift, or sale at cost or below cost, of samples of the particular commodity sought to be introduced to the consumer, or some useful trinket or gadget to be used in some way in connection with such commodity. This modern tendency is commonly accepted as a desirable and effective means of introducing a commodity to the consuming public.

If the Florida Citrus Commission, in the exercise of its broad, discretionary powers, in determining upon a plan for commodity advertising, publicity and sales promotion, has found that the distribution of a more practical juice extractor for home use by individual consumers is essential to the Commission's broad program of sales promotion to increase consumption of Florida citrus fruits, it is my opinion that such a finding is within the power conferred upon said Commission.

It is the duty of the Commission and within its power to decide upon a distinctive and suggestive trade mark and to promote its use in all ways to advertise Florida citrus fruits; and to make in the name of the Commission such advertising contracts and other agreements as may be necessary to carry out the purposes of the Acts.

The proposed contract between the Commission and Moscrip provides a medium through which the Commission proposes to promote the use of a trade mark to advertise Florida citrus fruit. The contract is to be made in the name of the Commission and is necessary for the carrying out of the plan adopted by the Commission in the exercise of its discretionary powers.

It was the clear intent of the Legislature that the Florida Citrus Commission should plan and conduct a campaign for commodity advertising, publicity and sales promotion to increase the consumption of Florida citrus fruits. The particular plan or plans to be adopted and conducted is left in the discretion of the Commission. If then, the Commission, after investigation, study and deliberation, has found and determined that the distribution of the Moscrip juice extractor is essential to its adopted plan to increase consumption of Florida citrus fruits, then

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I am of the opinion that the expenses to be incurred by it under the proposed contract would constitute reasonable and necessary expenses and obligations in connection with and required for the proper carrying out of the provisions of the citrus advertising Acts above mentioned.

The proposed contract gives to the Commission, as between it and Moscrip, the right to manufacture the particular extractor, nevertheless the contract is one conferring upon the Commission merely the exclusive right to control the manufacture, sale and distribution of the extractor and does not require its manufacture by the Commission.

It is my opinion that the Commission is not vested with the power necessary to enable it to invest citrus advertising funds in a plant or factory for manufacturing purposes, even though such plant or factory be used in manufacturing some product which will be used exclusively for advertising purposes. I am of the opinion, however, that the Commission is authorized to contract for the manufacture of such a product and to pay not only the royalties mentioned in the Moscrip contract but likewise to pay for the reasonable cost of the manufacture of the extractor.

In my opinion the Commission is authorized thus to procure the manufacture of the extractor in question and give it to the consuming public as a feature of its publicity, advertising and sales promotion campaign. However, with reference to the sale of the proposed extractor to the consuming public, I am of the opinion that the legality of such sales would be determined by the sales price of the extractor. It is my opinion that the various Acts do not grant to the Commission the power to engage in any business for the purpose of making money. If, therefore, the sales price of the proposed extractor is such that a profit necessarily flows to the Commission out of the manufacture, sale and distribution of such extractor, the proposition would then partake more of a commercial, money making scheme than an advertising program, as authorized by the Acts.

With reference to your authority to disburse Florida Citrus Commission funds for expenses that may accrue under the proposed contract, it is my opinion that such disbursements should be limited to the "Grapefruit Advertising Fund," "Orange Advertising Fund" and "Tangerine Advertising Fund" on a pro-rata basis, as prescribed in the various Acts creating those funds. I am further of the opinion that you have authority to disburse moneys from those funds for expenses that may accrue under the proposed contract, subject to the limitations hereinbefore pointed out, when vouchers therefor are exhibited and approved by the Commission.

CHAPTER XXVIII

INSURANCE

GENERAL PROVISIONS

January 17, 1941.—041-6.

COMPENSATION RATING BUREAU—CHARGES—DUTIES OF INSURANCE COMMISSIONER

QUESTION: Does the State Treasurer as Insurance Commissioner have any duties to perform in connection with charges by the Florida Compensation Rating Bureau to an insurance company which is a subscriber to such service?

To Hon. J. Edwin Larson, Insurance Commissioner:

Apparently, the National Council on Compensation Insurance is making certain charges for rating data that are furnished to certain insurance carriers. Mr. Owenby says in his letter to you:

"I am of the opinion that section thirty-eight of Chapter 17481, Acts of 1935 does not permit any such charges."

I have examined Section thirty-eight of this Act and the only reference that I see with regard to a rating bureau is the following portion of paragraph three of said Act:

"Provided, however, that any such insurer which is a member of a non-partisan rating bureau making rates for Workmen's Compensation Insurance in this State which admits to membership any insurer applying therefor and in which stock carriers and non-stock carriers have equal representation may, upon written notice to the Department, adopt the rates and rating plans of such bureau but shall not put into effect such rates and rating plans until the same shall have been approved by the Insurance Commissioner as meeting the requirements of this Act."

Of course, said provision relates to the rates charged by an insurance company as a premium upon a policy of insurance and has nothing whatsoever to do with the charge that the rating bureau makes for the service in compiling data for such purposes. I therefore do not find where you have any duty whatsoever to perform in the matter of the charge by the rating bureau to the insurance company which is a subscriber to such services.

GENERAL PROVISIONS

March 7, 1942.—042-117.

FEDERAL SAVINGS AND LOAN ASSOCIATIONS—DEPOSIT OF INVESTMENT CERTIFICATES

QUESTION: May investment share account certificates of Federal Savings and Loan Associations chartered under the laws of the United States and doing business in the State of Florida, be accepted for deposit by the Insurance Commissioner under statutes requiring certain securities to be deposited with the Insurance Commissioner by insurance companies, associations and societies, particularly Section 6, Chapter 19513, Acts of 1939?

INSURANCE—General Provisions

To Hon. J. Edwin Larson, Insurance Commissioner:

Chapter 17907, Laws of Florida, Acts of 1937, authorizes all life insurance companies, assessment life associations, fraternal benefit societies, fraternal benefit associations, sick and funeral benefit associations, fire insurance companies, corporations or associations, surety companies, casualty companies, accident insurance companies, and all other insurance companies, corporations or associations organized under the laws of the State of Florida, to invest funds of such organization in investment share accounts of any Federal Savings and Loan Association chartered under the laws of the United States of America and doing business in the State of Florida. This chapter has the effect of making such investment accounts legal investments for such organization, but it does not provide that such investment share accounts may be used for deposit as qualified security or as qualified deposits under the various statutes.

The Legislature, in Chapter 17130, Acts of 1935, made it lawful for banks, trust companies, insurance companies, etc., to invest their funds in notes or bonds secured by mortgage or trust deed insured by Federal Housing Administrator. However, this Act contains the further provision that:

"Such notes, bonds, debentures and securities herein made eligible for investment may be used as qualified security or as a qualified deposit or investment where any kind of bonds or other securities are required or may by law be deposited or accepted as security;" whereas, the 1937 Act, *supra*, with reference to Federal Savings and Loan Association investment share accounts, contains no such provision.

With reference to fire insurance companies, Section 6242 Compiled General Laws, requires that every fire insurance company

"... shall deposit with the State Treasurer of this State bonds of the United States, bonds of any of the States of the United States, bonds of the District of Columbia, or bonds of the cities or counties of this State, or cash, to the amount of twenty thousand dollars, or in lieu thereof the said company shall have the right to file with the State Treasurer a surety bond in the amount of twenty thousand dollars of a surety company authorized to do business in the State of Florida, said bond and company to be approved of by the State Treasurer . . ."

With reference to surety companies, Section 6302, Compiled General Laws, provides that such companies

"... shall be required to deposit with the Treasurer of this State bonds of the United States, or bonds of any State of the United States, and which amount according to their market value, to seventy-five thousand dollars which bonds shall be receipted for by the State Treasurer and held or deposited by him."

Section 6, Chapter 19513, Acts of 1939, requires that limited surety companies

"... shall be required to deposit with the Treasurer of this State, bonds or certificates of indebtedness of the United States or bonds, time warrants, revenue certificates or certificates of indebtedness of any state, county, district or municipality in the United States or of any political subdivision or district of any state, having a market value of Five Thousand (\$5,000.00) Dollars."

Section 5, Chapter 20410, Acts of 1941 provides that all benevolent mutual benefit associations or societies on the assessment plan

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"... shall deposit with the State Treasurer in cash, United States bonds, or bonds of any county, or any municipality of the State, to be approved by the State Treasurer, in the sum of Twenty Five Thousand Dollars, market value . . ."

Section 6393, Compiled General Laws, relating to fraternal benefit societies, requires that such societies in their process of incorporation shall deposit with the State Treasurer

"... bonds of the United States, bonds of any State, county or municipality of this State, to the amount of five thousand dollars, or a surety bond in a surety company authorized to do business in this State . . ."

Section 6265, with reference to sick and funeral benefit insurance, requires that individuals or organizations writing such insurance

"... shall fully satisfy the said State Treasurer, that such individual, company, corporation or association is possessed of in cash or has actually invested at least ten thousand dollars in mortgages or unincumbered improved real estate in the State of Florida worth double the amount loaned thereon, inclusive of buildings thereon, or in United States, State, county or municipal bonds at their market value, or five thousand dollars invested as above provided and five thousand dollars or more invested in improved real estate used and occupied by such company, corporation, or association in connection with its business . . ."

In my opinion, none of the foregoing provisions are sufficiently broad to include Federal Savings and Loan Association investment share accounts as permissible securities for deposit under the respective provisions thereof.

The foregoing are the only statutes applying to deposits with your department that I have considered in this connection, and this opinion is therefore limited to the deposits mentioned in the cited statutes.

GENERAL PROVISIONS

June 9, 1941.—041-320.

INSURANCE BUSINESS—FUNERAL HOME—DEFINITION

QUESTION: Where a firm purports to open a funeral home and to incorporate on the basis of issuance of stock of \$100.00 par value transferable and redeemable at \$125.00, such stock to represent a credit to be applied on account of funeral expenses incurred upon the death of the owner and holder of such stock or any transferees, would this firm be doing an insurance business?

To Hon. J. Edwin Larson, Insurance Commissioner:

The authorities are not in accord on the question as to what constitutes the doing of an insurance business, but in my opinion the weight of authority is that such a plan of operation as disclosed by the correspondence would constitute the doing of an insurance business.

GENERAL PROVISIONS

June 9, 1941.—041-319.

INSURANCE BUSINESS—MOTOR CLUBS—DEFINITION

QUESTION: Is a motor club doing an insurance business when a member thereof is entitled to: \$50 reward for recovery of stolen car and

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capture and conviction of thief; \$100 police bond card plus Western Union collect message and identification card, and legal advice, counsel and aid through attorney?

To Hon. J. Edwin Larson, Insurance Commissioner:

The authorities are not in accord on the question of "What constitutes doing an insurance business, or what constitutes an insurance contract," but in my opinion the weight of authority is that the foregoing service by the motor club constitutes the doing of an insurance business.

GENERAL PROVISIONS

October 25, 1941.—041-617.

INSURANCE BUSINESS—ORANGE STATE BOND AND MORTGAGE COMPANY—DEFINITION

QUESTION: The Orange State Bond and Mortgage Company purchases "car-time-payment contracts" from the Ford dealer, Sunrise Motor Company, and the Chevrolet dealer, Padrick Chevrolet Company, both located in Ft. Pierce. Such purchases are confined solely to these two car dealing companies. When the dealer sells a car on time payment assurance is given the purchaser that in event of loss through fire, theft or collision, the car will be replaced or repaired at no expense to the purchaser. The Orange State Bond and Mortgage Company in purchasing these contracts from the dealer agrees to indemnify the dealer if the purchaser of the car suffers loss through fire, theft or collision. The contracts are sold to the Orange State Bond and Mortgage Company at such a discount as to justify this agreement of indemnification. Is the Orange State Bond and Mortgage Company engaged in insurance business?

To Hon. J. Edwin Larson, Insurance Commissioner:

The Orange State Bond and Mortgage Company is engaging in the insurance business. My reasons for so ruling are because of what has been said by the following authorities: (These quotations are annotations from A. L. R. as shown.)

"To constitute insurance, a promise to compensate another for loss from a specified cause need *not be one for the payment of money*, but may be to give its equivalent or render some act of value to the insured."

State of Ohio ex rel. Herbert S. Duffy, Attorney General, vs. Western Auto Supply Company; 16 N. E. 2d 256; (119 A. L. R. 1236). (Italics supplied.)

"An undertaking on the part of one selling merchandise on the installment plan, to cancel the debt in case a buyer dies before its satisfaction, has been held to constitute insurance within the meaning of a statute prohibiting the making of insurance contracts except by a company and in the manner authorized by law. And in several cases loan contracts which were to be cancelled in case of death have been held to be in the nature of insurance." (63 A. L. R. 726.)

"Where a manufacturer of watches issued with each watch sold a certificate in which it agreed to replace such watch with a new watch of like quality provided the first should be lost within a year of purchase, in the United States or Canada, through burglary or robbery, no additional price being charged for this service, the manufacturer paying from its own funds the premium on a burglary and theft policy issued by a wellknown insurance company, it was held in Ollendorff Watch Co. vs. Pink (1938) 279 N. Y. 32, 17 N. E. 2d 676, that the watch company

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was engaging in the insurance business in contravention of the insurance law, the court saying that the agreement in question went further than a guaranty or warranty, since the latter would relate in some way to the nature and efficiency of the product sold, and the former 'relates directly to the substance and purpose of the transaction.'

"And in *State ex rel. Duffy vs. Western Auto Supply Co. (Ohio)* (reported herewith) ante, 1236, it was held that a contract whereby the seller of pneumatic tires agreed that, in the event of damage to a tire sold, it would replace it upon payment of a portion of the purchase price of the new tire based upon the number of months of use the purchaser had enjoyed from the original tire, such agreement not being restricted to damage from defective material or workmanship, but including loss from defective brakes, blowouts, underinflation, and other causes unrelated to the quality or workmanship of the goods sold, was a contract of insurance. As will be observed, the reasoning of the Ohio court was very similar to that of the New York court in the *Pink Case (N. Y.) supra.*" (119 A. L. R. 1246.)

"And in *Arlington Cemetery Co. vs. Baldrige (1929) 19 Del. Co. Rep. (Pa.) 625*, it was held that a contract for the sale of cemetery lots, which provides that on the death of the purchaser the balance of the instalments shall be cancelled and the deed to the lot delivered, is a contract of insurance, requiring its issuer to comply with the statutory regulations as to insurance companies.

"A contract for the sale of land, which provided that the vendor, in the event of the vendee's death before the purchase price was fully paid, should convey the property free and clear to the vendee's estate, was held in *Barna vs. Clifford Country Estates (1932) 143 Misc., 813, 258 N. Y. S. 671*, to be a contract of insurance under the statute requiring insurance companies to obtain a certificate from the superintendent of insurance." (100 A. L. R. 1455.)

I am not unmindful of the fact that there is a split of authorities on the question of what constitutes doing an insurance business, but I believe the weight of authority follows the line of decisions as set forth as the basis for my ruling.

GENERAL PROVISIONS

March 18, 1941.—041-178.

INSURANCE COMMISSIONER—CERTIFICATE OF AUTHORITY—ISSUANCE

QUESTION: Where an unincorporated insurance firm, not of this state, has applied to the Insurance Commissioner for renewal of its certificate of authority to transact business and its financial statement shows assets comprised of United States Bonds, Treasury certificates, state, county and municipal bonds and mortgages on improved real estate totaling \$116,861.78, of which \$31,540.00 is deposited with insurance departments of other states for the protection of policy holders of such states, has the insurance commissioner

(1) A right to exclude those special deposits in other states in arriving at the minimum amount of assets specified in Section 6199, C.G.L.?

(2) If such special deposits aggregating \$31,540.00 are not so excluded would the insurance firm possess the necessary amount of such assets and investments as to entitle them to a certificate of authority in this State?

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To Hon. J. Edwin Larson, Insurance Commissioner:

I call your attention to Section 6199, C.G.L.:

"... Any association, firm or individual of this state, shall be entitled to such certificate of authority by furnishing evidence to the satisfaction of the said State Treasurer that such ... association, firm or individual is possessed of, and has actually invested at least \$100,000.00 in bonds of the United States, or any state, or any county or municipality in the United States, or mortgages or deeds of trust on improved real estate, worth not less than 50 per cent more than the amount loaned thereon, at their market value ..."

I also call your attention to the following definitions of the term "possessed of":

"Possession is that condition of fact under which one can exercise his power over a corporeal thing to the exclusion of all others." (Nice vs. Frayser, 24 F. 460, 463.)

"Possession has been defined as 'having, holding or detention of property in one's own power or command; ownership, whether rightful or wrongful'; and 'actual possession' as simply having property in immediate control or power of party." (Field Furniture Co. vs. Community Loan Co., 79 S. W. 2d 211, 215, 257 Ky. 825.)

"The word 'possession' means *prima facie* actual possession." (Bragg vs. Wiseman, 47 S. E. 90, 55 W. Va. 330.)

"'Possession' means simply the owning or having a thing in one's power and implies present right to deal with property at pleasure, and exclude other persons from meddling with it." (State vs. Danser, 144 S.E. 295, 296, 105 W. Va. 495.)

(The above definitions and citations taken from Words and Phrases, Perm. Ed. Vol. 33, pp. 71, etc.)

In my opinion the intent of the legislature in the enactment of Section 6199, supra, was that there would be a minimum of \$100,000.00 in free assets. By free assets I mean, assets subject to the claims of policy-holders in general. Assets that are deposited with insurance departments of other states, "earmarked", so to speak, for the protection of the policy-holders of such states, are not in the possession of the insurance firm within the contemplation of said statute. My answer, therefore, to your first question is "yes."

The provision in Section 6199, supra, requiring citizens of other states to have invested and to be possessed of securities of a certain class in the total sum of \$250,000.00, while citizens of this State need only have invested and be possessed of like securities in the total sum of \$100,000.00 is a discrimination between citizens of this State and other states, contrary to the provision of the Constitution of the United States, and, therefore, such requirement is void. (State vs. Insurance Comm. 37 Fla. 564; 20 So. 772.) The above principal of law is applicable when the insurance firm, not of this State, is unincorporated. If the insurance firm is a foreign corporation then the above principal of law may not be applicable. My answer, therefore, to your second question is "yes."

GENERAL PROVISIONS

October 24, 1941.—041-616.

INSURANCE COMMISSIONER—DISPOSITION OF PROCESS

QUESTION: Is the Insurance Commissioner authorized to forward copy of process served upon him under Section 6198, C.G.L. to the resi-

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dent agent or other person designated by the Insurance Company, instead of to the Home Office of the Insurance Company?

If so authorized, is it necessary for the Company to execute an agreement designating the person to whom copy of process should be forwarded?

To Hon. J. Edwin Larson, Insurance Commissioner:

There is nothing to prohibit you from forwarding the copy of process to the resident agent or to any other person, firm or corporation provided you have been directed to do so in writing by the defendant. The statute, Section 6198, C.G.L., is silent as to what disposition you are to make of the process after it is served upon you, but because of your established practice of forwarding it to the home office of the defendant I suggest you continue such practice absent directions in writing to the contrary from the defendant. There is no necessity for any agreement to be executed.

GENERAL PROVISIONS

July 29, 1941.—041-343.

INSURANCE COMMISSIONER—SERVICE OF PROCESS

QUESTION: Summons ad respondendum was issued by the Clerk of the Circuit Court for Palm Beach County directed to Afro-American Insurance Company. Is the State Insurance Commissioner authorized to accept this summons?

To Hon. J. Edwin Larson, Insurance Commissioner:

You are authorized to accept this summons. My reason for so ruling is because Section 6198, Compiled General Laws, 1927, not only provides that service upon an insurance company may be obtained by service of process upon you, but it goes further and provides that you are authorized "to admit" such service of process.

GENERAL PROVISIONS

August 6, 1942.—042-377.

INSURANCE COMPANY—CLAIM ALLOWANCE—VALIDITY

QUESTION: Certain insurance agencies in the State propose having certain of their large workmen's compensation insurance risks handle their own claim service, giving to such risks a claim allowance, justified by the companies and agencies being relieved thereby of the detail work and investigation entailed in adjusting and servicing such contracts of insurance. In other words, the employers or insureds would take the place in certain instances of the companies' regularly employed adjusters. It is proposed that the expense of such adjusters should be credited to the employers or insureds for the service they render in servicing and adjusting the claims under their policy.

Is there anything in the insurance laws of Florida to prohibit such a plan of operation?

To Hon. J. Edwin Larson, Insurance Commissioner:

There appears to be only one provision of the statute which has any bearing upon this proposed plan of operation.

Section 625.19 Florida Statutes, 1941 provides as follows:

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"625.19 Insurers not to offer certain inducements or rebates.—No insurer, by itself or any other party, and no insurance agent, solicitor or broker, personally or by any other party, shall offer, promise, allow, give, set off or pay, *directly or indirectly*, as inducement for insurance on any risk in this state now or hereafter to be written, any rebate of, or part of the premium payable on the policy, or on any policy, or of agent's commission thereon, or earnings, profit, dividends or other benefits founded, arising, accruing or to accrue on such insurance or therefrom, or *any other valuable consideration or inducement to or for insurance which is not specified, promised or provided* for in the policy contract of insurance."

If this proposed plan of having the insured render adjusting service, for which he is allowed compensation, is used as an inducement to the insured to purchase such insurance, then, in my opinion, such proposed plan is prohibited by the statute quoted above, unless the same is provided for in the insurance contract.

On policies of insurance now in effect, which were procured through no such inducement, it would be legal, in my opinion, for such plan to be set up and operated with reference to existing insurance, but only during the remainder of the time covered by the existing policy. In order for the plan to be followed as to new policies, such policy should show on its face or in a properly authenticated and duly authorized rider, authorized by the company, that the credit provided for to cover such adjustment service will be allowed. The plan of operation proposed when provided for in the policy contract is not prohibited by law.

All I have said herein applies alike to stock and mutual companies.

GENERAL PROVISIONS

April 4, 1941.—041-179.

INSURANCE COMPANY—UNAUTHORIZED DIVISION OF PREMIUMS

QUESTION: Is a foreign insurance company violating any provision of Florida law under the following facts:

A foreign fire insurance company authorized in Florida accepts insurance from an automobile finance company on cars sold in this State. The automobile finance company collects from each assured the proper premium and remits same to the foreign insurance company which pays to a duly licensed agent of the company, who is a resident of Florida, a commission of 2½% which is established in the agency agreement as the proper commission on this class of business. The licensed agent countersigns the policies or certificates in each case but does not ordinarily solicit the business.

The foreign insurance company also pays to a general agent or a broker who is not a resident of Florida, a brokerage commission and this general agent or broker in turn pays a part of the commission he receives to the automobile finance company with the knowledge and consent of the insurance company.

When this part of the commission (25% in this instance) is paid to the finance company, the latter sets up a reserve fund in the name of the automobile dealer who originally made the sale of the car covered by this insurance and this credit results in profit to this extent to the dealer who originally made the same.

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To Hon. J. Edwin Larson, Insurance Commissioner:

I call your attention to Chapter 6849, Acts of 1915, which was an act entitled, "An Act Concerning Insurance Companies, Association and their Agents and Other Persons, Firms and Corporations, Prohibiting Discrimination and Rebating, Misrepresentation and Twisting." This act was amended by Chapter 7870, Acts of 1919, formerly Section 4268 Revised General Statutes 1920 and now being Section 6225, C. G. L.

This act provides:

"No insurance company or association, by itself or any other party, and no insurance agent, solicitor or broker, personally or by any other party, shall offer, promise, allow, give, set off or pay, directly or indirectly, as inducement to insurance on any risk in this State now or hereafter to be written any rebate of, or part of the premium payable on the policy, or on any policy, or of agent's commission thereon, or earnings, profit, dividends or other benefit founded, arising, accruing, or to accrue on such insurance or therefrom, or any other valuable consideration or inducement to or for insurance which is not specified, promised or provided for in the policy contract of insurance; nor shall any company or association, agent, collector or broker, personally or otherwise, offer, promise, give, sell or purchase as inducement to insurance or in connection therewith, any stocks, bonds, securities or property, or any dividends or profits, accruing or to accrue thereon, nor, except as specified in the policy contract, offer, promise or give any other thing of value whatsoever as an inducement to insurance."

In our discussion yesterday concerning this question and the foregoing act, the question was raised whether or not the title of the act was sufficient to embody all of the prohibitions contained therein. I am now satisfied that the title of the act is sufficient for the reason that the adoption of general revision of statutes cures any defect in the title of any original act revised. (*McConville vs. Fort Pierce Bank & Trust Company*, 135 So. 392.)

In my opinion the facts as stated in your said letter clearly constitute a violation of Section 6225, C. G. L.

GENERAL PROVISIONS

March 10, 1941.—041-119.

INSURANCE COMPANY—UNSATISFIED JUDGMENT—REVOCATION OF LICENSE

QUESTION: Where a judgment was obtained against an insurance company, and an appeal perfected by the insurance company in accordance with the statutes is now pending, may the State Insurance Commissioner revoke the permit of said insurance company to do business on the demand of the judgment creditor because the judgment is not satisfied?

To Hon. J. Edwin Larson, Insurance Commissioner:

Section 6219, C.G.L., provides:

"Whenever a judgment or decree for the recovery of any money has heretofore been, or hereafter may be recovered in any of the Courts of this State against any insurance company . . . holding a certificate of authority therefor from the State Treasurer . . . and the same shall not be satisfied in three months after the entry or *within three months after an affirmance of the judgment or decree by an appellate court . . .*"

INSURANCE—General Provisions

The statute goes on to provide that when proper proof is furnished you, you shall forthwith revoke all authority or license for the transaction of any kind of insurance business within this State by such insurance company.

You will observe from the foregoing that the insurance company has three months after the affirmance of the judgment or decree by an appellate court within which to pay the judgment. Whether or not the appeal has been perfected or any question relating to the sufficiency of the appeal, it is not within your province to determine, but must be challenged by the parties in interest.

It is my opinion, therefore, that you are without authority to revoke the permit or license of this particular insurance company to do business in the State of Florida until three months have elapsed after the affirmance of the judgment or decree by appellate court.

GENERAL PROVISIONS

April 7, 1942.—042-161.

"MAIL ORDER" COMPANIES—REGULATION

QUESTION: (1) Is there a Florida law conferring on the State Insurance Commissioner powers to supervise or regulate in any manner, so-called "Mail Order" insurance, or insurance exclusively by mail by companies not legally licensed to do business in this State, having no agents or other representative domiciled here?

(2) If the answer to question (1) is in the negative, is there any law on the Statute Books of Florida relating to, regulating or exercising any authority over such mail order insurance business?

To Hon. J. Edwin Larson, State Treasurer and Insurance Commissioner:

(1) You as Insurance Commissioner have no power to supervise or regulate in any manner "mail order" insurance or insurance exclusively by mail by companies not licensed in this State doing business and having no agents or representatives domiciled in the State of Florida.

(2) There is no authority under Florida laws which gives you authority to regulate or exercise any authority over any such mail order insurance business.

In the event any of the so-called "mail order" insurance companies are licensed in Florida, then such company would come under your regulation and supervision.

GENERAL PROVISIONS

January 22, 1942.—042-54.

TRUST COMPANIES—LICENSE AND CERTIFICATE OF AUTHORITY

QUESTION: The Title and Trust Company of Florida, Jacksonville, has been writing title insurance in connection with its title and trust business, and it has been doing so without a license. Upon this statement of facts:

(A) Should the Title and Trust Company of Florida, and other Title and Trust Companies operating similarly, be required to obtain an insurance license and certificate of authority as required in Section 1182 and Section 6198, Compiled General Laws of Florida?

INSURANCE—General Provisions

(B) If the answer to Question (A) is in the affirmative, should the Title and Trust Company of Florida, and other Title and Trust Companies operating similarly, be required to file the Annual Convention Form Statement with the Insurance Department as required of all other Insurance Companies?

(C) In the event of a negative answer to Question (A), can the Insurance Department issue a license to solicitors and/or agents for the Title and Trust Company of Florida, and other Title and Trust Companies operating similarly?

(D) For the purpose of administering other regulatory statutes for Insurance Companies, what is the status of the Title and Trust Company of Florida, and other Title and Trust Companies operating similarly as regards the Insurance Department?

To Hon. J. Edwin Larson, Insurance Commissioner:

I am assuming that the Title and Trust Company of Florida was incorporated in 1922, as you have advised me, and my opinion is predicated on this assumption being correct:

(A) In my opinion the Title and Trust Company of Florida should be required to secure a license and certificate of authority as provided in Section 6198, Compiled General Laws, and that it is subject to the payment of a license tax in the sum of \$200.00 as provided in Section 1182, Compiled General Laws, but is relieved from the payment of the gross premium tax as provided in said section, as it would come within the exemption of domestic insurance companies not being required to pay a gross premium tax.

(B) In my opinion the Title and Trust Company of Florida should be required to file the Annual Convention Form Statement as contemplated by Section 6198, Compiled General Laws.

(C) My answer to your Question (A) being in the affirmative disposes of this question.

(D) I cannot answer this question because it is so general in its term and scope that it would require nothing short of a brief on the question. For example, the assets required of Trust Companies doing a title insurance business will depend upon the date of their incorporation. (Prior to the enactment of Chapter 6847, Laws of Florida, 1915, such companies had to have invested \$25,000.00 in a certain class of securities. In 1915, Chapter 6847 was enacted, providing that such companies had to be possessed and have invested at least \$100,000.00 in a certain class of securities, but that the new requirement was not applicable to companies incorporated prior to the enactment of the law.) May I suggest, therefore, that you state any further question you may have on this subject matter with particularity.

I have been given to understand that your predecessors in office have never attempted to exercise any jurisdiction over Trust Companies doing an insurance business. I do not know why these companies have not been regulated, because Section 6126 and Sub-section 14 thereof, and Section 1182 and Section 6198, Compiled General Laws, may be read in *pari materia*. It is well settled that a Sovereignty may, under the exercise of the police power, regulate the writing or doing of an insurance business. (29 Am. Jur. 59, 13 Am. Jur. 222, 16 C.J.S. 787, 19 C.J.S. 445.) Section 6126, Compiled General Laws, merely provides the scope of the powers and capacities of a Trust Company. (Perkins vs. Fuquay, 106 Fla. 405, 143 So. 323.) It was not contemplated in the Trust Act that Trust Companies doing an insurance business should not be regulated

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by the insurance laws of this State. The writing of title insurance is doing an insurance business. (63 A.L.R. 771.) It is also well settled that a Sovereignty cannot delegate or contract away its police power. (29 Am. Jur. 222.)

AGENTS

November 14, 1941.—041-645.

COMMISSIONS—SURRENDER TO EMPLOYER

QUESTION: Is there a violation of the State Insurance Laws when a bank employee, who acts as a licensed insurance agent, throws all of his commissions into the profit of the bank by which he is employed?

To Hon. J. Edwin Larson, Insurance Commissioner:

The above facts do not in and of themselves constitute a violation, *but I call to your attention that if the bank employee holds an agent's license chiefly for the purpose of securing commissions on insurance written for the bank then there is a violation of Section 5 of Chapter 20263, Laws of Florida, Acts of 1941, which provides certain grounds for the revocation of an agent's license, one being:*

"... that he is no longer in good faith carrying on the business of an insurance agent or solicitor, but holds a license chiefly for the purpose of securing rebates or commissions on insurance written for himself or family, or some partnership, or corporation, or association in which he is interested, or with which he is connected . . ." (Italics supplied.)

AGENTS

September 22, 1941.—041-564.

LICENSES—ACCIDENT AND HEALTH COVERAGE

QUESTION: Are the provisions of Chapter 20263, Acts of 1941, applicable to agents and solicitors of Insurance Companies writing only accident and health coverage?

To Hon. J. Edwin Larson, Insurance Commissioner:

Chapter 20263, Laws of Florida, Acts of 1941, is not applicable to insurance companies writing only accident and health coverage nor to their agents or solicitors because of this long standing administrative construction. (See *Volunteer State Life Insurance Company vs. J. Edwin Larson*, 147 Fla. 118; *Frey, Inc. vs. State ex rel. Taylor*, 127 Fla. 671, 173 So. 812; *State vs. Bryan*, 50 Fla. 293, 39 So. 929; *Amos vs. Mosely*, 74 Fla. 555, 77 So. 619, L.R.A. 1918C 482; *State vs. Leatherman*, 99 Fla. 899, 128 So. 21; *Bloxham vs. Consumers' Elec. Light, etc., R. Co.*, 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L.R.A. 507.)

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November 14, 1941.—041-646.

LICENSES—EMPLOYEE OF FINANCE COMPANY

QUESTION: A corporation exists for the purpose of financing automobiles. One of the officers or employees of this finance company wishes to qualify as an insurance agent because the finance company intends to write the insurance on the automobiles it finances and also intends to do a general insurance business. Does such a plan of operation violate any insurance law of the State of Florida?

INSURANCE—Agents

To Hon. J. Edwin Larson, Insurance Commissioner:

The facts, as above stated, do not constitute a violation of any of our insurance laws. There is no prohibition upon an agent writing insurance for himself or for a member of his family, or for a corporation, partnership, or association in which he may be interested. There is a prohibition, however, against an agent holding his license chiefly for the purpose of securing commissions upon insurance written for one of the above enumerated classes, to-wit: himself, family, partnership, association, or corporation in which he is interested. I call your attention to Section 5 of Chapter 20263, Laws of Florida, Acts of 1941, which provides certain grounds for the revocation of an agent's license, one being:

"... that he is no longer in good faith carrying on the business of an insurance agent or solicitor, but holds a license *chiefly* for the purpose of securing rebates or commissions on *insurance written* for himself or his family, or some partnership, or corporation, or association in which he is interested, or with which he is connected, . . ." (*Italics supplied.*)

AGENTS

January 6, 1942.—042-23.

LICENSES—EMPLOYEE OF LENDING ASSOCIATION

QUESTION: Is there any prohibition against the licensing of an employee or officer of a bank, building and loan association, or other lending institution, as a life insurance agent, when the sole purpose of obtaining such license by the employee will be the writing of life insurance upon the life of the borrower as further security for the loan? In some instances the officer or employee so licensed will retain the commission on the insurance written, while in other cases he will surrender his commission to the lending institution?

To Hon. J. Edwin Larson, Insurance Commissioner:

In my opinion there is no prohibition against the licensing of such an employee.

AGENTS

January 26, 1942.—042-39.

LICENSES—QUALIFICATIONS

QUESTION: If a person holds a life insurance agent's license under the provisions of Chapter 20327, Laws of Florida, 1941, and applies for a license to write fire and other casualty lines of insurance, is such person excused from the requirements of Chapter 20263, Laws of Florida, 1941?

To Hon. J. Edwin Larson, Insurance Commissioner:

In my opinion such person is not excused from complying with the requirements of Chapter 20263, Laws of Florida, 1941, because Section 9 of Chapter 20263, *supra*, expressly provides that said Chapter shall not apply to life insurance companies or associations or to sick and funeral benefit associations or to their agents or solicitors. In other words, the two classes of insurance agents, to-wit; the casualty group and the life insurance group are regulated and governed by two separate and distinct laws.

INSURANCE—Agents**AGENTS**

July 22, 1941.—041-389.

LICENSES—RESIDENCE QUALIFICATIONS

QUESTION: Must an insurance solicitor be a continuous bona fide resident of the State of Florida for the six months last past preceding his application for a license?

To Hon. J. Edwin Larson, Insurance Commissioner:

Section 2 of Chapter 20263, Acts of 1941, specifically provides that only persons who shall have continuously resided in this State for a period of not less than six months immediately preceding the date of making application for license shall act as such agent, while the same section provides that no person shall be licensed as a solicitor unless the applicant is a bona fide resident of this State—not providing for any certain duration of such residence as to solicitors.

It is my opinion that the six-months requirement as to residence only applies to those applicants for an agent's license and is not applicable to those applicants for a solicitor's license.

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January 7, 1942.—042-9.

LICENSES—REVOCATION

QUESTION: When a person duly licensed as an insurance agent devotes only one hour per day to his insurance business and the balance of the day is engaged by a company, not an insurance company, in the position as secretary to said company, is there a violation of Chapter 20263, Acts of 1941, which act relates to and governs certain classes of insurance agents and solicitors?

To Hon. J. Edwin Larson, Insurance Commissioner:

In my opinion, the above statement of facts does not disclose a violation of Chapter 20263, Laws of Florida, Acts of 1941. The said Act provides certain grounds for the revocation of a license, which are:

(1) Improper or illegal conduct or practices as to render the agent or solicitor unfit to carry on such business.

(2) His continuance in such business being detrimental to the public interest.

(3) That he is not acting in good faith in carrying on the business of an insurance agent or solicitor, but holds a license chiefly for the purpose of securing rebates or commissions on insurance written for himself or his family or some partnership or corporation or association in which he is interested or with which he is connected.

(4) That the person is guilty of rebating or offering to rebate or unlawfully dividing or offering to divide his commissions or that his license was secured by fraud or misrepresentation, or that the license was otherwise improperly procured.

AGENTS

October 18, 1941.—041-599.

LICENSES—TEMPORARY—ISSUANCE

QUESTION: Does the Insurance Commissioner have authority to issue temporary license authorizing an applicant to act as a life insurance agent, pending his investigation of such applicant?

INSURANCE—Agents

If so, would it necessitate the Commissioner conducting a hearing as contemplated by Section 5, Chapter 20327, Acts of 1941, before he could terminate such temporary license?

To Hon. J. Edwin Larson, Insurance Commissioner:

You have no such authority to issue a temporary license to such person.

There is no provision in our law which permits your doing so. The law contemplates that the license when issued will expire on the 1st of October following unless the same has been revoked or suspended by you, or the authority of the agent to act for the life insurance company has been terminated.

The answer to your first question, being in the negative, disposes of your second question.

AGENTS

May 18, 1942.—042-240.

QUALIFICATION ACTS—VIOLATIONS—LAUNDRIES

QUESTION: Laundries purchase what is known as a Laundry Floater Policy which covers fire or theft to the customer's laundry while on the premises of the assured and in trucks owned and operated by the assured. The policy is usually written with a deposit premium of maybe \$50.00 and the assured (laundry) reports each month the amount of gross sales and pays a premium based upon a rate of five to ten cents per \$100.00 of their gross sales. The company has the right to audit the books of the laundries and if after such audit the books disclose a correct statement of gross sales, and the premium has been paid each month, the assured is then returned the deposit premium.

(1) Is the collection of premiums by laundries from customers, as above set forth, in order to pay the premium on the Laundry Floater Policy each month, in violation of the Agents Qualification Law?

(2) Is it in violation of law for the laundry to retain the excess in the event the amount collected from customers is more than is required to pay the premium?

To Hon. J. Edwin Larson, Insurance Commissioner:

(1) The laundry is guilty of violating the Agents Qualification Law.

(2) The laundry is guilty of violating the Insurance Law.

I arrive at the above conclusions by reason of Section 1 and Section 7 of the Insurance Law passed by the 1941 Legislature, which substantially states that it is unlawful for any person, without conforming to the provisions of the Insurance Law, directly or indirectly, to represent himself to be the agent of any insurer, and it shall be unlawful to collect or forward any insurance premium, or to solicit, negotiate, effect, procure, receive, or forward, directly or indirectly, any contract of insurance.

RECIPROCAL

January 13, 1942.—042-21.

INSURERS—REPORTS

QUESTION: Are insurers operating under the laws governing reciprocal insurance required to make reports under Section 9 of Chapter 20671, Acts of 1941?

INSURANCE—Reciprocal

To Hon. J. Edwin Larson, Insurance Commissioner, State Fire Marshal:

Section 9 of Chapter 20671, Acts of 1941, provides as follows:

"Every person, firm, partnership, association and corporation writing an insurance on fire risks in the State of Florida shall report to the Insurance Commissioner all fire losses on the property insured by them showing the owner and occupant of the premises burned, location, date and cause of fire, amount of insurance, value of property, and the loss paid; said report shall be made on the 10th day of each and every month.

"Chiefs of fire departments (and mayors of municipalities having no organized fire departments) shall be ex-officio Deputy Fire Marshals and shall make similar reports on forms to be furnished by the Insurance Commissioner."

With reference to reciprocal insurers, Section 6259, Compiled General Laws, provides that:

"Except as herein provided no law of this State relating to insurance shall apply to the exchange of such indemnity contracts unless they are specifically mentioned."

However, Chapter 20671 is not a "law of this State relating to insurance." The purpose of this chapter is to designate the State Treasurer, ex-officio Insurance Commissioner, as "State Fire Marshal," and to impose upon him in this capacity the duty of enforcing all laws and provisions of said Act relating to:

- (1) Prevention of fires.
- (2) Storage, sale, and use of combustibles and explosives,
- (3) Installation and maintenance of privately owned automatic and fire alarm systems and fire extinguishing equipment,
- (4) Construction, maintenance, and regulation of fire escapes,
- (5) The means and adequacy of exits from all buildings in event of fire, and
- (6) Suppression of arson, and the investigation of fires.

Section 9 of said chapter requires reports of fire losses to be made not only by every person, firm, partnership, association and corporation writing an insurance on fire risks in this State, but likewise requires such reports on fire losses to be made by chiefs of fire departments and mayors of municipalities having no organized fire departments. The Act clearly does not relate to insurance, but relates to the prevention of fires and fire losses.

In addition, Section 11 of said Act provides that all laws, or parts of laws, in conflict therewith are thereby repealed.

It is, therefore, my opinion that insurers operating under the laws governing reciprocal insurance are required to make the reports provided for under Chapter 20671, Acts of 1941.

FIRE AND CASUALTY INSURANCE

July 13, 1942.—042-351.

BONDS—DEPOSITED WITH STATE TREASURER—PURPOSE

QUESTION: Can the Insurance Commissioner properly certify that deposits made by American Fire and Casualty Company, of Orlando,

INSURANCE—Fire and Casualty Insurance

Florida, and held by him as State Treasurer under Sections 6242, 6245 and 6302, Compiled General Laws, are so held by him for the "benefit of all the policyholders of such company in the United States"?

To Hon. J. Edwin Larson, Insurance Commissioner:

Among other things, Section 6242, Compiled General Laws, provides that every fire insurance company shall deposit with the State Treasurer of this State bonds, etc., to be held by the Treasurer for the protection of all legal claims against such company in this State.

Section 6245, Compiled General Laws, provides that upon bonds deposited as aforesaid with the State Treasurer by any such insurance company, the holders of all policies of said company who are citizens or residents of this State at such time, or who hold policies issued upon property in this State, shall have a lien for the amount due them under such policies for losses, return premiums or equitable values, and shall be entitled to be paid ratably out of the proceeds of said bonds.

In my opinion, the purpose of the foregoing statutes is unquestionably to create a trust fund in the hands of the State Treasurer for the benefit of Florida citizens, residents, or those owning property in Florida which is covered by policies issued by such companies.

Section 6302, Compiled General Laws, provides that companies chartered by this State or other States which offer or undertake to become surety upon any bond or surety contract before being accepted as surety thereon, shall deposit with the Treasurer of this State bonds, etc., to the amount of \$75,000.00.

This section does not contain a specific statement with reference to Florida citizens or residents having claims against such companies. However, Section 6303, as amended, does have reference to the deposit required under Section 6302, and authorizes circuit courts of this State, whenever such companies may be adjudged insolvent, to take charge of such deposits, direct a sale of such securities, and distribute the proceeds of such sale proportionally among all of the Florida creditors of such companies who may make proof of their claims to the satisfaction of the Court.

Sections 6302 and 6303, *supra*, have been construed by the Supreme Court of Florida in the case of *Kelly vs. Knott*, 163 So. 64, and the deposit required by Section 6302 was held by the Court in that case to be "put up with the State Treasurer as a trust fund to be held by him for the protection of and benefit of all Florida claimants entitled to seek satisfaction thereout."

The foregoing case of *Kelly vs. Knott* went to the Supreme Court of the United States, *U. S. vs. Knott*, 298 U. S. 543, 80 L. Ed. 1321, and that Court, while reversing the cause on other grounds, accepted as conclusive the holding of the Supreme Court of the State of Florida that "the deposit with the State Treasurer constituted a trust fund for the benefit of Florida, its political subdivisions, citizens and residents; that they were entitled to be paid first out of it; . . ."

Therefore, it is my opinion that you cannot properly certify that deposits referred to in Sections 6242, 6245 and 6302, *supra*, are held by you for the benefit of all of the policyholders of the affected company in the United States, since such deposits constitute a trust fund in your hands for the benefit of citizens and residents of Florida and those having property in Florida covered by contracts issued by such company.

INSURANCE—Fire and Casualty Insurance**FIRE AND CASUALTY INSURANCE**

February 12, 1942.—042-79.

MARTIAL LAW—EFFECT ON FIRE INSURANCE POLICIES

QUESTION: In the event martial law should be declared in the State of Florida, what effect, if any, would be had upon fire insurance policies containing the following clause:

"This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority?"

To Hon. J. Edwin Larson, Insurance Commissioner:

Martial law is defined as:

"The law administered by the military power of a government when it has superseded the civil authority in time of war or when the civil authorities are unable to enforce the laws."

In my opinion, the declaration of martial law in and of itself would have no effect whatever upon a policy containing the above provision. If, however, a loss were sustained, directly or indirectly by reason of an invasion, insurrection, riot, civil war or commotion, which brought about the declaration of martial law, then there would be no liability for such loss under a policy containing the above provision. Further, even though martial law was declared by reason of some insurrection, riot, etc., if the loss was due to an independent cause a recovery could be had under such a policy.

FIRE AND CASUALTY INSURANCE

October 3, 1941.—041-509.

**SURETY BONDS—CONTINUING INSTRUMENT—RELEASE—
CANCELLATION**

QUESTION: (1) Is a surety bond filed by a fire insurance company pursuant to Sec. 6242, C.G.L. a continuing instrument?

(2) Can the surety be released from liability upon 60 days' written notice to obligee?

(3) Would obligee's position be weakened by accepting a 60-day cancellation endorsement to such bond?

To Hon. J. Edwin Larson, State Treasurer:

(1) The surety bond is a continuing instrument.

(2) There is no provision in our law for the cancellation of liability by the surety. On the other hand, there is no express prohibition preventing the State Treasurer from permitting the surety to cancel further liability accruing to the principal. But you should not permit such a cancellation for the reasons set forth in my answer to your third question.

(3) The obligee's position would be weakened by accepting such an endorsement on the bond, for the reason that with such a provision in the bond, if the fire insurance company should decide to terminate its business in this State and to withdraw therefrom, it might possibly leave policyholders and creditors without recourse. It is for this reason that I do not believe you should permit any such endorsement on the surety bond.

INSURANCE—Fire and Casualty Insurance**FIRE AND CASUALTY INSURANCE**

September 23, 1941.—041-549.

**SURETY BONDS—WITHDRAWAL—FLORIDA BUSINESS
DISCONTINUED—LIABILITY**

QUESTION: When and under what circumstances may surety companies be released from liability under their bonds executed as required by Section 6242, Compiled General Laws of Florida?

To Hon. J. Edwin Larson, Insurance Commissioner:

The surety company may not be released from liability until it has been proven to your satisfaction that the insurance company's liability, whether fixed or contingent upon its policies to persons residing in the State of Florida, has been satisfied or has been terminated, or until it has been proven to your satisfaction that the insurance company's fixed liability for losses and for taxes has been satisfied and all contingent liabilities under its policies have been assumed by another company doing business in this State, provided the re-assuring company has deposited with you bonds not less in value than those of the company proposing to retire.

My reason for so ruling is because of the provisions of Section 6246, Compiled General Laws. I appreciate the fact that the statute is very vague when it uses the term "satisfactory evidence." As a practical proposition, I do not see how you can permit the surety company to be released from liability before the running of the statute of limitations. The policy being an obligation in writing, the statute of limitations is five years from the time the cause of action accrues. Prior to the running of the statute of limitations, the surety should not be released until you are satisfied that there are no claims or liabilities, fixed or contingent, and the only way I know that you can satisfy yourself of this fact would be to have furnished to you a complete list of all the policyholders in the State of Florida and secure from each and every one a release of all liability to the insurance company, which, in my opinion, is a task of impractical performance.

FIRE AND CASUALTY INSURANCE

June 9, 1941.—041-329.

**VALUED POLICY LAW—CO-INSURANCE LAW—APPLICATION AND
INTENT**

QUESTION: What is the intent of the Valued Policy Law and Law of Co-insurance?

To Hon. J. Edwin Larson, Insurance Commissioner:

Section 6240, Compiled General Laws, being the Valued Policy Law, applies only to fire insurance on buildings and structures. The law provides that the policy shall state the value thereof and in the event of total loss that this sum shall be paid, and in case of partial loss that the full amount of the partial loss shall be paid, but that in no event shall the insurer be required to pay more than the amount upon which a premium is paid. In other words, the sole intent and purpose of the Act is for the fixing of the insurable value of the premises, and to prohibit any question as to the actual value in case of loss, and to prohibit such factors as depreciation, etc.

The intent of the Law of Co-insurance contracts, being Section 6248, Compiled General laws, was to prohibit companies writing fire insurance

INSURANCE—Fire and Casualty Insurance

on real or personal property from issuing policies providing for co-insurance unless the attention of the assured was called thereto, and that the rate charged for the insurance was based thereon. The standard co-insurance clause provides that either the assured shall maintain insurance on each item of property insured to the full cash value thereof, or will maintain insurance on each item insured at a certain percentage of the cash value, and failure of the assured to do so shall make the assured an insurer to the extent of such deficit and liable for his proportion of any loss.

In my opinion there is no conflict between the two sections. For example, a structure may be insured against loss by fire and the insurable value placed at \$10,000. The assured does not have to insure to the full amount of the insurable value, but the insurable value will be the basis of determining total loss or partial loss. This same contract of insurance can contain a co-insurance provision requiring that the assured shall keep the structure insured at not less than a certain percentage of its insurable value. The Law of Co-insurance in effect is an amendment to the Valued Policy Law insofar as it permits the issuing of policies containing co-insurance clauses.

FIRE AND CASUALTY INSURANCE

July 12, 1941.—041-378.

VALUED POLICY LAW—CO-INSURANCE LAW—EFFECT

QUESTION: What is the effect of the Valued Policy Law in connection with the Law of Co-Insurance?

To Hon. J. Edwin Larson, Insurance Commissioner:

EXAMPLE (1): POLICY ISSUED WITHOUT CO-INSURANCE CLAUSE. Insurable value, \$10,000. Amount of insurance, (on which premium is paid) \$5,000. Partial loss, \$2,000. Amount payable to policyholder, \$2,000.

EXAMPLE (2): POLICY WITH 75 PER CENT CO-INSURANCE CLAUSE. Insurable value, \$10,000. Amount of insurance, (on which premium is paid) \$5,000. Insured assumes risk, \$2,500. Partial loss, \$2,000. Amount payable to insured, \$1,333.33. Loss to be withstood by policyholder, \$666.67.

EXAMPLE (3): POLICY WITH 75 PER CENT CO-INSURANCE CLAUSE. Insurable value, \$10,000. Amount of insurance, (on which premium is paid) \$7,500. Partial loss, \$2,000. Amount payable to insured, \$2,000.

EXAMPLE (4): POLICY WITH 75 PER CENT CO-INSURANCE CLAUSE. Insurable value, \$10,000. Amount of insurance, (on which premium is paid) \$7,500. Total loss, \$10,000. Amount payable to insured, \$7,500.

The Valued Policy Law was enacted in 1899. The law permitting co-insurance was enacted in 1927. Prior to the enactment of the Co-insurance Law, policies containing clauses of co-insurance were in violation of the law. The Law of Co-insurance amends the Valued Policy Law in that the provision of the Valued Policy Law, which provides:

"In case of partial loss the full amount of the partial loss shall be paid, . . ."

is ineffective in those policies which provide that the insured shall at all times maintain insurance at a certain percentage of the value of the

INSURANCE—Fire and Casualty Insurance

building or structure and failure of the insured to comply with such requirement leaves him a co-insurer to the amount of such failure.

Insurance agents are not correct when they tell a policy holder "that he need not bother about the co-insurance requirement because the Valued Policy Law will pay him the full amount of his loss irrespective of the amount of insurance carried."

The Co-insurance Law does not void the provision in the Valued Policy Law which requires that the insurable value shall be fixed by the agent and written in the policy. The purpose and intent of this provision, as I stated in my former opinion, is to fix the value of the building or structure in case of total loss. In other words, if the insured maintains insurance to the full amount of the insurable value and pays a premium on that amount, and a total loss occurs the insurance company must pay the amount as fixed in the policy. They are prohibited from taking into consideration any factors of depreciation, such as termites, dry-rot, wear and tear, etc.

MUTUAL FIRE INSURANCE ASSOCIATIONS

September 28, 1942.—042-466.

NON-ASSESSABLE POLICIES—ISSUANCE

QUESTION: Is there any legal prohibition against the issuance in Florida by a foreign mutual fire insurance company of a policy without any provisions therein for assessment against the policy-holder or other contingent liability?

To Hon. J. Edwin Larson, Insurance Commissioner:

I can find no statutory prohibition against the issuance of such policies by foreign mutual fire insurance companies.

Our statutes do provide that no domestic mutual fire insurance association shall issue any insurance policy for a cash premium and without contingent liability until and unless it possesses a surplus of at least \$100,000 and not less in amount than the capital required of domestic stock fire insurance companies. While this provision does not specifically apply to foreign mutual fire insurance companies it is my opinion that the Insurance Commissioner, under his broad, general, supervisory power and discretion, could in the interest of the policy-holder in this state take such provisions into consideration in arriving at a regulatory policy relating to such foreign companies. By this I have in mind that a foreign company doing business in this state should be required to show qualifications at least equal to domestic companies.

It is my further opinion that the Insurance Commissioner in arriving at a regulatory policy in this regard may properly take into consideration the requirements of the domiciliary state of the foreign company with reference to requirements for writing such policies in their home state. No foreign company should be permitted, in my opinion, to write such policies in this state unless they at least meet the requirements in this state which may be prescribed for the issuance of such policies in their home state.

By way of summary it is my opinion that in the absence of statutory regulations on this subject the Insurance Commissioner may adopt such reasonable regulations and requirements as may adequately protect the policy-holder under the type of policy referred to herein.

INSURANCE—Mutual Fire Insurance Associations**MUTUAL FIRE INSURANCE ASSOCIATIONS**

May 30, 1941.—041-291.

PUBLIC CORPORATIONS—RIGHT OF TO INSURE WITH—INSURANCE OF PROPERTY—PROFITS

QUESTION: (1) Is the return of the unused portion of the premium paid by a policyholder of a mutual fire insurance company (the amount of the premium which the company management has found it unnecessary to use in meeting the losses and expenses of operation), and commonly known as "dividends to policyholders," profit?

(2) May Florida school boards and other public corporations, boards or associations, in this State insure their property in mutual fire insurance companies under policies without contingent liability (Nonassessable) and accept a return of the unused portion of the premium, commonly called a "dividend," at the end of the policy term?

To Hon. J. Edwin Larson, State Treasurer and Insurance Commissioner:

(1) The theory of mutual insurance is that the insurance is furnished at cost to the insured. The mutual company does not operate on a level premium plan, such as does the stock company. The mutual company estimates its losses and expenses for the ensuing year and upon this estimate determines the premium assessment. It is commonly recognized that the estimate is set sufficiently high to cover unforeseen losses and expenses. If, at the end of the company's fiscal year, the excess portion, or loaded portion, of the premium is returned to the policyholder, this does not, in my opinion, constitute "profit." If, however, the refund includes earnings from surpluses or investments, this would constitute "profit."

My answer to your first question is:

The return of the excess portion of that which is "premium" as heretofore interpreted, to the policyholder at the end of the fiscal year of a mutual fire insurance company, is not profit earned by such insurance company, nor is the same classifiable as a profit return to the policyholder.

Article IX, Section 10, of the Constitution of Florida provides:

"The credit of the State shall not be pledged or loaned to any individual, company, corporation or association; nor shall the State become a joint owner or stockholder in any company, association or corporation. The Legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual."

Section 6284, Compiled General Laws of Florida, provides:

"... Provided, however, that any such corporation, organized and operating under this Article, may issue policies of insurance covering property of this State, or of any county or municipality of this State, without contingent liability when such policy of insurance contains a provision that the State or any such county or municipality insured under it may not participate in the profits of such corporation."

In my opinion, a public corporation may insure in a domestic mutual fire insurance company provided:

(a) The policy contains a provision that the same is without contingent liabilities.

INSURANCE—Mutual Fire Insurance Associations

(b) The policy contains a provision that the insured may not share in the profits.

(c) That the insured is neither a joint owner nor a stockholder in the company.

In my opinion, a public corporation may insure in a foreign mutual fire insurance company provided:

1. The policy relieves the corporation from all contingent liability so as not to violate the provision of the Constitution as to the lending of credit by the State, county, etc.

2. That the insured is neither a joint owner nor a stockholder.

The reason for the difference between domestic and foreign mutual fire insurance companies indicated in the above being that the provisions of Section 6284, C.G.L., quoted above, apply only to domestic mutual fire insurance companies.

(2) My answer to your second question is:

Florida School Boards and other such corporations, etc., in this State, may insure their property in mutual fire insurance companies, under policies that carry no contingent liability against the insured and may accept a return of the unused portion of the premium if such premium return does not embrace any earnings from surpluses or investments and is just a return of an excess portion, or loaded portion, of the premium originally paid.

STATE FIRE MARSHAL

October 9, 1941.—041-585.

DUTIES

QUESTION: Under Section 7, Chapter 20671, Acts of 1941, what are the duties of the State Fire Marshal and the procedure to be followed in performing such duties?

The questions are more specifically stated as follows:

(1) Under Section 7, Paragraph 1, of said Act, who is authorized to administer the oath?

(2) a. Under Section 7, Paragraph 2, of said Act, are deputies authorized to make arrests?

b. Are the deputies authorized to make affidavit supporting the issuance of a warrant?

c. Advise what procedure to follow.

(3) Under Section 7, Paragraphs 3 and 4, of said Act, who is authorized to serve subpoenas?

(4) What procedure shall be followed in case of failure or refusal to answer subpoenas or to produce books, papers, documents, etc.?

(5) What procedure should you follow in seizing furniture and other personal property?

To Hon. J. Edwin Larson, State Fire Marshal:

(1) My answer to this question is that the State Fire Marshal is authorized to administer the oath. His deputy or deputies may be au-

INSURANCE—State Fire Marshal

thorized to administer the oath provided they have the delegation or authority from the State Fire Marshal.

(2) a. My answer to this question is that the deputy or deputies are not authorized to make the arrest.

b. My answer to this question is that the deputy or deputies are authorized to make affidavits supporting the issuance of a warrant, provided such authority has been delegated to them by the State Fire Marshal. (*McKinnon vs. McCollum*, 6 Fla. 376; *Blitch vs. Buchanan*, 100 Fla. 1202, 131 So. 151; re: Delegation of authority to deputies.)

c. My answer to this question is that because of the various interpretations and constructions that may be placed upon Chapter 20671, supra, as a matter of procedure until a court of competent jurisdiction has construed this Section of the Act, that the affidavit be made before the proper officer presiding as a committing magistrate and that the warrant, if issued, be placed in the hands of the proper arresting officer.

(3) My answer to this question is that the subpoenas should be served by the regular process serving officers.

(4) My answer, assuming that you mean a refusal to comply with a subpoena or order issued by the State Fire Marshal, to this question is that there is no procedure prescribed in said Act, nor is there any delegation of authority to the State Fire Marshal to punish for contempt a person who refuses to obey any order or subpoena issued by the State Fire Marshal, and that in the absence of such a delegation of authority the administrative head of the department has no such power. If the subpoena or order has been issued by a duly constituted court, then a refusal by a person will subject himself to the regular contempt proceedings to be instituted by the court from which such order or subpoena emanated.

(5) My answer to this question is that there is no procedure prescribed in the Act for the seizing of furniture or other personal property to be used as evidence and that you have no right to proceed to seize such articles.

LIFE INSURANCE, GENERALLY

October 22, 1941.—041-608.

INSURANCE COMPANIES—COMPLIMENTARY ADVERTISING

QUESTION: Is there a violation of Section 6225, Compiled General Laws of Florida, when an insurance company, as a means of advertising, offers free of charge to a notary, for whom it executes a bond, an expiration stamp and a notary public sign?

To Hon. J. Edwin Larson, State Treasurer and Insurance Commissioner:

This does not constitute a violation of Section 6225, Compiled General Laws.

My reason for so ruling is because of the following authorities: 29 Am. Jur. 330; *MacDonald vs. Calkins*, 251 Pac. 458; *Northern Assurance Co. vs. Meyer*, 160 N.W. 617; *McGee vs. Felter*, 108 N.E. 1100; *Cooley's Brief on Insurance*, Vol. 2 (2d), page 1675.

INSURANCE—Life Insurance, Generally**LIFE INSURANCE, GENERALLY**

July 31, 1941.—041-417.

INSURANCE COMPANIES—GUARANTEE OF DIVIDENDS TO INSURED

QUESTION: A company offered Florida cities workmen's compensation insurance under a participating policy with a guaranteed dividend of 15%, not provided for in the policy itself or in the participating endorsement but made a part thereof. Would such an offer be a violation of Section 6225, Compiled General Laws of Florida, and of Section 38 of the Workmen's Compensation Act?

To Hon. J. Edwin Larson, Insurance Commissioner:

From an examination of the facts, the plan and procedure employed by said corporation for securing of the casualty business of the City of Lakeland, Florida for the year 1941, are a violation of Section 6225, C. G. L.

The penalty for the violation of Section 6225, C. G. L. is a misdemeanor, the punishment for which shall be a fine of one hundred dollars for each and every violation or, in the discretion of the court, imprisonment of not less than ninety days nor more than six months, and that upon conviction the State Treasurer shall have the authority to revoke the license theretofore issued to any company, association, agent or broker convicted of such violation. (Sec. 7963, C. G. L.)

It also appears that a penalty may be invoked against this company under the provisions of Section 5966 (37), C. G. L., Permanent Supplement, which provides that, upon good cause shown, the State Treasurer may, upon recommendation of the Florida Industrial Commission, revoke the license of such insurance company.

It also appears that the plan and agreement of said corporation may be in violation of the law, Section 5966 (37), 4, C. G. L., Permanent Supplement, which prohibits an insurance company from fixing or making rates or schedules of rates or the charging of a rate which *discriminates* unfairly between the same class of risks within this State. If this fact exists, the Insurance Commissioner may order such discrimination removed.

LIFE INSURANCE, GENERALLY

January 20, 1942.—042-33.

MORTALITY ENDOWMENT SUPPLEMENTAL CONTRACT—LIABILITY OF COMPANY—INSURED KILLED IN MILITARY SERVICE

QUESTION: (1) Under Paragraph 10 of the Miscellaneous Provisions of Pan-National Life Insurance Company Policy it is provided that war risk may be assumed under a written permit from the company and the payment of an extra premium by the insured. If this permit is given and the extra premium paid, would the company be liable for the payment of a living claim under the Mortality Endowment Supplemental Contract in case the insured dies or is killed in military service?

(2) Said Paragraph 10 provides that should the insured not get the written permit and does not pay the extra premium fixed by the company, the company's liability will be limited to the amount of the legal reserve to the credit of this policy. Under these circumstances should the insured enter military service and die or be killed, would the company be liable for the living claim under this Mortality Endowment Supplemental Contract?

INSURANCE—Life Insurance, Generally

(3) If the company should, in lieu of the provisions in said Paragraph 10, give the insured a permit to enter military service without collecting the extra premium but in said permit should agree in case of the insured's death to pay said insured twice or three times the amount of the premiums paid by him and he should die or be killed in military service, would the company be liable for the living claim of the Mortality Endowment Supplemental Contract?

To Hon. J. Edwin Larson, Insurance Commissioner:

Paragraph 2 of the Mortality Endowment Supplemental Contract provides that the supplemental contract shall mature as a mortality endowment and shall be payable when the principal contract of which it is a part becomes the oldest certificate in its division and the association subsequent thereto experiences and pays a valid mortality loss under such certificate in the same division.

In view of the foregoing provision, it is my opinion that under the circumstances described in your first and third questions the company or association would experience a valid mortality loss sufficient to mature the endowment contract, and would be liable for the living claim under the supplemental contract.

With reference to your second question, with the company's liability limited to the amount of legal reserve to the credit of the policy, it is my opinion that a claim therefor by reason of the death of the insured in military service would not be a valid mortality loss as contemplated by the endowment contract, and the living claim would not mature by reason of such death.

FRATERNAL BENEFIT INSURANCE

February 11, 1942.—042-89.

APPLICANTS—MEDICAL EXAMINATIONS

QUESTION: Are medical examinations required to be made of applicant for insurance in Fraternal Benefit Insurance Societies under the laws of the State of Florida?

To Hon. J. Edwin Larson, Insurance Commissioner:

When the present laws regulating fraternal benefit societies in this state were enacted in 1915, Medical examinations were mentioned in three sections of the regulating Act.

Section 12 of Chapter 6970, Acts of 1915, the regulating Act above referred to, provided that whenever there was deposited with the State Treasurer the Articles of Incorporation of a proposed fraternal benefit society, certified copies of its Constitution, laws, rules and regulations, and copies of all proposed forms of benefit certificates, applications therefor and circulars to be supplied by such society, together with certain securities or surety bond in the amount of \$5000, conditioned upon return of certain advance payments if the organization was not completed within one year, then the State Treasurer, if satisfied with the showing made by the proposed society, should issue to the incorporators thereof a preliminary certificate authorizing the society to solicit members upon certain specified conditions.

When the preliminary certificate was issued, then the society was entitled to solicit members for the purpose of completing its organization, and was required to collect from such members the amount of not less than one regular monthly payment, and issue to each such applicant

INSURANCE—Fraternal Benefit Insurance

a receipt for the amount so collected. In order to complete its organization, and before it could incur any liability other than for such advance payments, or issue any benefit certificate, or pay or allow or offer or promise to pay or allow any death or disability benefit, such society was required to secure at least five hundred such applicants for an aggregate sum of \$500,000, which applicants were required to be regularly examined by a legally qualified practicing physician, with certificates of such examination filed and approved by the chief medical examiner of such society.

The medical examination here required applies, in my opinion, only to the five hundred applicants required to complete the organization of the society and to be secured under its preliminary certificate. This requirement is still in effect and is now found in Section 6394. Compiled General Laws.

Section 7 of the original Act provided that any such society could admit to beneficial membership any person not less than sixteen and not more than sixty years of age who was examined by a legally qualified physician. This section of the Act became Section 4441 of the Revised General Statutes of 1920, and Section 6405, Compiled General Laws of 1927. However, this section was amended in 1937 by the enactment of Chapter 17947 of the Acts of that year, which amendment reduced the minimum age limit of members, permitting the admission of members under sixteen years of age, and left out the medical examination requirements as contained in the original section.

As amended, this former Section 7 of the Act regulating fraternal benefit societies now applies only to such societies as have completed their organization and have accumulated and maintain the reserves required by the Statute.

The only other reference to medical examinations in the regulating Act is found in Section 8 thereof, now known as Section 6406, Compiled General Laws, wherein it is provided that every certificate issued by such society shall specify the amount of benefits provided, and shall provide that the Articles of Association, or charter, the Constitution and laws of the society, the application for membership and medical examination, etc., shall constitute the agreement between the society and the member.

The above requirement followed immediately after former Section 7, and had reference to the medical examination required therein, because it had reference to a society which had completed its preliminary organization, inasmuch as only receipts for advance payments and not binding certificates for benefits were given the applicants during the preliminary organization. Inasmuch as former Section 7 has now been amended and no longer requires a medical examination, it is my opinion that the reference in Section 8 (now Section 6406, Compiled General Laws) to the medical examination, does not amount to a mandatory requirement that there should be a medical examination of applicants received under the provisions of amended Section 7. However, if there is a medical examination, it must, in my opinion, be construed as a part of the agreement between the society and its members.

It is my opinion that a medical examination is required of all applicants whose applications are secured by a fraternal benefit society under its preliminary certificate and prior to its completion of organization, and thereafter no further medical examination is required of applicants accepted under the provisions of amended Section 7.

Any former opinion in conflict herewith is hereby specifically overruled.

INSURANCE—Fraternal Benefit Insurance**FRATERNAL BENEFIT INSURANCE**

March 9, 1942.—042-119.

INCORPORATION—PROCEDURE

QUESTION: (1) What procedure is necessary for incorporating a Fraternal Benefit Society?

(2) Would the name "Southeastern Insurance Cooperative" be permissible under Florida law for such a fraternal benefit society?

To Hon. J. Edwin Larson, Insurance Commissioner:

Section 6529, Compiled General Laws, specifically provides that fraternal benefit societies may not be incorporated under the general corporation laws of 1925.

Section 6051, Compiled General Laws, specifically provides that the provisions of Chapter II, Compiled General Laws (Sections 5978 to 6051, inclusive) shall apply to every class of corporation for profit, except as limited by the special provisions of the sub-chapters thereof.

Among the sub-chapters referred to, I find sub-chapter IX specifically relates to the incorporation and regulation of fraternal benefit societies.

It is my opinion that the incorporation of fraternal benefit societies is fully provided for in the sub-chapter above referred to and carried as Sections 6391 to 6444, inclusive, of Compiled General Laws.

Section 6392, Compiled General Laws, provides that the proposed corporate name of the society shall not so closely resemble the name of any society or insurance company already transacting business in this state as to mislead the public or lead to confusion. Therefore, since you, as State Treasurer, are the proper official with whom the proposed charter is to be filed, and since you are the officer duly authorized to approve the same and issue the necessary permits to transact business, you are the one to determine whether or not a proposed name is permissible, taking into consideration the provisions of the statute and the names of other societies and insurance companies on file in your office transacting business in this state.

BURIAL INSURANCE

November 13, 1941.—041-642.

POLICY—ASSIGNMENT FOR FUNERAL PURPOSES

QUESTION: Should the State Insurance Commissioner take any action in regard to an assignment which is proposed to be attached to a straight life insurance policy, which assignment provides for a specific funeral home to attend to the burial of the deceased?

To Hon. J. Edwin Larson, Insurance Commissioner:

You should disapprove this assignment upon the ground that it is contrary to law.

My reasons for so ruling are:

(1) "... It shall be unlawful for any such payment to be made or withheld for the purpose of either directly or indirectly inducing, or in furtherance of any arrangement or agreement designed to induce, the employment of a particular person, firm or corporation to conduct the

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funeral of the insured." (Sec. 4, Chap. 17070, Laws of Florida, Acts of 1935.) (*Italics supplied.*)

(2) The ruling of the Supreme Court of Ohio in the case of *Robbins vs. Hennessey*, 99 N. E. 319.

BENEVOLENT MUTUAL BENEFIT ASSOCIATIONS

November 20, 1942.—042-528.

ACCIDENTAL DEATH POLICIES—PROVISIONS RELATING TO ACCIDENTS FROM WAR RISKS

QUESTION: May a Benevolent Mutual Benefit Association operating under Chapter 640, Florida Statutes, 1941, be permitted to issue an accident policy providing benefits for accidental death only; also may the association include in such policy a special provision to cover civilian war risks such as might be occasioned by enemy air raids, coastal bombardments or land invasion?

To Hon. J. Edwin Larson, Insurance Commissioner:

Section 640.01 Florida Statutes, provides that associations or societies incorporated under Chapter 640 may transact such business and functions and carry out such purposes as may be set forth in their certificates of incorporation issued pursuant to said chapter.

Section 640.03 Florida Statutes, provides that the certificate of incorporation among other things shall set forth the object and purpose of such association, a copy of the proposed by-laws, and a full and complete plan defining as to how such association proposes to operate, and the maximum amount of benefits upon the life of any one member it intends to provide, which amount shall be paid in cash and shall not exceed \$1000.

I can find no statutory prohibition against the issuance by such associations of the type of policy to which you refer.

It is therefore my opinion that such associations may issue such policies provided the certificates of incorporation and the by-laws of the associations authorize the issuance thereof.

BENEVOLENT MUTUAL BENEFIT ASSOCIATIONS

March 11, 1941.—041-101.

ASSESSMENTS—LEVY

QUESTION: (1) May a domestic mutual benefit corporation segregate the liabilities assumed by it under a reinsurance contract with a foreign mutual benefit corporation from the liabilities incurred from certificates written directly by the domestic corporation?

(2) May the domestic mutual benefit corporation assess the certificate holders of the foreign mutual benefit corporation for payment of all losses incurred through said group and, at the same time, limit the assessment upon members holding certificates issued by it (domestic corporation) for losses arising only out of this group?

To Hon. J. Edwin Larson, Insurance Commissioner:

The answers to your questions are determined by the provisions of the contract of reinsurance; the rider issued by the domestic corporation; the certificate issued by the foreign corporation and its by-laws. I have

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examined the provisions contained in the foregoing instruments and call your attention to the pertinent parts thereof as relating to your questions.

I call your attention to Sec. 9 of the certificate issued by the foreign corporation, which provides:

"The application, this certificate and the by-laws of the corporation shall constitute the entire contract . . ."

and to Sec. 1, Art. VII of the by-laws of the foreign corporation, which provides:

"The member shall pay *an assessment* on the first day of each month. If his certificate is issued between the first and the fifteenth day of the month, inclusive, the member's first monthly payment will fall due on the first day of the following month after date of issue. If his certificate is issued after the fifteenth day of the month, the member's first monthly payment will fall due on the first day of the second month after the date of issue. From the total assessment collection, except the first four monthly payments, not less than fifty per cent shall be set aside and used only for the creation of the Reserve and Mortuary Funds required by the By-Laws as accumulated reserves and for the payment of the approved claims, *and no extra payments will ever be demanded until said Mortuary Fund is not sufficient to pay approved claims in full.* In such event it is mutually agreed that the Corporation has the right, when necessary to demand and collect assessments in addition to those stipulated above in an amount sufficient to include the actual mortality experience, the guaranty and reserve, and the general operating expense of the company. It is understood and agreed that the assessment rates are not based upon calculations from any mortality table with assumed rate of interest, and that they may be increased if necessary to comply with the provisions of this certificate and in accordance with the laws under which it is issued."

and to the reinsurance contract, which provides that the domestic corporation accepts the assets and liabilities of the foreign corporation in accordance with the provisions contained in the certificate issued by it (meaning the certificate issued by the foreign corporation); and that the rider issued by the domestic corporation provides that the domestic corporation assumes all liabilities of the foreign corporation, subject however, to the provisions of said certificate (meaning the certificate issued by the foreign corporation); the reinsurance agreement and the provisions of Chapter 15885, Laws of Florida, Acts of 1933, as amended.

There is no prohibition under Chapter 15885, Acts of 1933, as amended by Chapter 16802, Acts of 1935; Chapter 19121, Acts of 1939, against such segregation and assessments; nor do I find any prohibition against a corporation incorporated under the provisions of the above statute, from issuing a policy which would contain such provisions.

My answer to your first question is "yes" and my answer to your second question is "yes", provided the Mortuary Fund of the foreign group or class is not sufficient to pay the approved claims of said group or class in full.

BENEVOLENT MUTUAL BENEFIT ASSOCIATIONS

January 23, 1942.—042-38.

INITIAL DEPOSIT—RIGHT TO ASSESS POLICYHOLDERS

QUESTION: (1) Has a Benevolent Mutual Benefit Association the right to levy extra assessments upon its policyholders to raise the additional reserve fund required in Chapter 20410, Acts of 1941?

INSURANCE—Benevolent Mutual Benefit Associations

(2) If the answer to the first question is in the negative, would a policy provision purporting to give the Association such right be valid and enforceable against the policyholders?

To Hon. J. Edwin Larson, Insurance Commissioner:

(1) In my opinion such associations do not have the right to assess their policy or certificate holders for the purpose of raising this additional deposit.

My reasons for so ruling are because it is apparent that in Section 5, Chapter 15885, Laws of Florida, 1933, the deposit of \$5,000.00 therein required is not to be raised by any assessment against the policyholders. The intent of Section 2 of Chapter 20410, Laws of Florida, Acts of 1941, is obviously to require a deposit of \$25,000.00 before a company, incorporated after the enactment of said chapter, can commence to do business, and that companies already incorporated have until June 30, 1942, to have this additional required sum of money deposited with you. It is not logical to conclude that if these Benevolent Mutual Benefit Companies could not assess their members under Chapter 15885 for the purpose of raising the then required sum of \$5,000.00 which everyone will surely admit, that they surely cannot now assess their members to increase the sum to \$25,000.00.

A further reason why I do not believe such companies can assess their certificate or policyholders for such a purpose is because such a company incorporated after the enactment of Chapter 20410, supra, must make this initial deposit of \$25,000.00 before they can commence to do business. What reason or logic or justice is there, therefore, to hold that a company incorporated prior to the enactment of Chapter 20410, supra, could levy such assessments?

It is true that Section 14 of Chapter 15885, supra, provides:

"The cost of maintaining membership certificates by assessments shall include a sufficient amount to cover the actual mortality experience, the guaranty and reserve as herein provided, and the general operating expense of the association . . ."

but when the Act is read in its entirety, the term "guaranty and reserve" can only mean the guaranty and reserve fund that is created by the assessment of \$1.00 per year per certificate.

A further reason for my so holding is found in the phraseology of the last paragraph of Section 2 of Chapter 20410, supra, where reference is made to the "initial deposit" and "reserve fund." Apparently, the Legislature drew a distinction between the two funds.

(2) In my opinion such associations do not have the right to levy an assessment for such a purpose even though the policy provisions purport to give it such right, because the Legislature by the enactment of Chapter 15885, supra, as amended, put a limitation upon these associations as for what purposes they could assess their members.

BENEVOLENT MUTUAL BENEFIT ASSOCIATIONS

July 2, 1941.—041-353.

INSURANCE COMMISSIONER—DISPOSITION OF DEPOSIT UPON LIQUIDATION

QUESTION: A Benevolent Mutual Benefit Association has decided to terminate its business, what is its right to possession of the securities and moneys deposited with the State Insurance Commission under the provisions of Section 5, Chapter 19121, Acts of 1939?

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Hon. J. Edwin Larson, Insurance Commissioner:

It appears that the company had a special meeting, called by its Board of Directors, on the 13th day of June, passed a resolution to terminate its business, and that all unearned premium payments were refunded as of the 1st day of July, 1941.

In my opinion, you should not release the securities that have been deposited with you by this association until it has been definitely determined that there are no unpaid claims against this association nor are there any claims to arise. It would appear that it is going to necessitate a release of all liability from each member of this association, for the reason that I know of no way of determining what claims may arise in the future. I make this statement not unmindful as to the provisions contained in Section 5 on the last page of the policy for the reason that our Supreme Court has held that under such provisions as contained in this section, the same will be deemed to have been complied with if the insured has notified the insurer as soon as it was within his ability to do so. In other words, this provision may be voided upon certain grounds.

BENEVOLENT MUTUAL BENEFIT ASSOCIATIONS

November 23, 1942.—042-534.

POLICIES—FORM

QUESTIONS: Has the Insurance Commissioner the authority to require companies operating under the Benevolent Mutual Benefit Association Laws to stamp on the face of their policies in red ink "Assessment Policy"?

Is the provision of law requiring that such policies have plainly printed in red ink on the first page of such policies, in conspicuous form, the fact that full payment of loss is conditioned upon the ability of the Association to collect assessments from its members for such purposes, fully complied with by the following statement appearing on the face of a specimen policy: "This Policy is issued under the provisions of Chapter 15885, Acts of 1933, as amended, and payments herein provided by this contract are conditioned upon the ability of the Corporation to collect assessments from the members for such purposes" and is said provision of law complied with when the foregoing statement appears in red on the face of a policy wherein and whereon the color red predominates?

To Hon. J. Edwin Larson, Insurance Commissioner:

The important part, and the required part, of the foregoing quotation, is the last clause thereof, and yet, the way the quotation is set up and constructed, the conspicuousness of the required clause is, in my opinion, lost.

Further, it is my opinion that the conspicuousness of said quotation is destroyed by the use of a rather impressive red border and the other use of red ink on said policy. The obvious intent of the Legislature in requiring that said clause be printed in red ink, was to make it stand out above everything else in the policy, in order that the assured might not fail to recognize the type of policy he was acquiring. In my opinion, this plain intent of the statute is violated and defeated when the use of red ink in other portions of the policy is promiscuous. As a matter of fact, in the specimen policy, the printed matter which stands out is that which is done in black.

The statute provides that the policy shall have plainly printed in red ink on the first page of the policy in conspicuous form the fact that

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full payment of loss is conditioned upon the ability of the insurer issuing said policy to collect assessments from its members for such purposes. If the entire policy were printed in red ink, that would be an obvious effort to defeat the intent of the statute, and where, in the present case, the required clause has been so placed as to blend with and become almost a part of the border around the face of the policy, which border is also in red ink, it is my opinion that such practice violates the intent of the statute.

Under Section 640.07 you have the authority to consider a copy of all contracts for benefits which such Associations propose to use, and it is made your duty therein to approve the same if found to be clear and definite in form and content, equitable, fair and explicit in its provisions, to the end that the proposed assured shall be fully and clearly advised as to the extent and nature of the obligation assumed by the Association, and it is also made your duty therein to disapprove all such forms as may be submitted that do not definitely and clearly cover the purpose for which the organization is incorporated in compliance with said law, or the true meaning and intent of which is inequitable, unfair, deceptive, ambiguous, involved, or obscure.

Under the foregoing statute, it is my opinion that you have the authority to disapprove the type of policy, specimen copy of which is attached to your request, on the ground that said policy, with respect to the required clause hereinbefore quoted, is not in strict compliance with the law, is deceptive and obscure.

It is my opinion that you have no authority to require that said Association stamp "Assessment Policy" on such policies as they may issue. You do have the authority, however, in my opinion, to require that the clause required by the statute be clearly and conspicuously set out on the face of said policy.

BENEVOLENT MUTUAL BENEFIT ASSOCIATIONS

July 13, 1942.—042-357.

REINSTATEMENT OF POLICY—EXTENDED BENEFITS

QUESTION: If an insurance company accepts a reinstatement of an insurance policy from an assured whose age is known to the company, may the company extend the schedule of benefits beyond the provisions stated in the insurance policy?

To Hon. J. Edwin Larson, Insurance Commissioner:

From the correspondence attached to your inquiry, it appears that two policies of insurance were issued and lapsed, that they were subsequently reinstated when assured was sixty-six years, two months, and twenty-six days old, and that assured is now deceased, and the beneficiary under the policy has filed a claim. The company has offered a settlement of thirty per cent of the face value of the policy and, in arriving at this figure, the company is extending the schedule of benefit beyond what is provided in the policy.

The two policies were written when the assured was of the age between sixty-four and sixty-five years, but the reinstatement of the policy occurred when assured was sixty-six years of age. The policies provided in Sub-section (b) under Section 10, as follows:

"It is mutually understood and agreed that if the Member is of the age of sixty-one and not over the age of sixty-three at the date of issuance or last reinstatement of this certificate, seventy per cent of the

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benefits herein provided for shall be payable; or if the Member is the age of sixty-four and not over sixty-five nearest birthday at the date of issuance or last reinstatement of this certificate, fifty per cent of the benefits herein provided for shall be payable."

The company now endeavors to extend the benefits accruing under the policy to the age of sixty-six according to some schedule not appearing in the policy and by the extension of such schedule reduces the amount from fifty to thirty per cent of the face value of the policies. I am unable to arrive at any such conclusion conformable to the adoption of such a schedule by the insurance company. The rule for the construction and interpretation of insurance contracts is that the policy must be liberally construed in favor of the insured so as not to defeat, without a plain necessity, his claim to the indemnity which in making the insurance it was his object to secure.

National Surety Company and Wilder vs. Williams, as Receiver, 74 Fla. 446; 77 So. 212.

The Aetna Casualty and Surety Co. vs. Frank Cartmel, 87 Fla. 495; 100 So. 802.

The general law is that the policy of insurance is a contract between the insurer and the insured. The two policies of insurance referred to provide:

"1. THE APPLICATION, and the policy constitute the entire contract between the Member and the Company and shall continue in force and effect only so long as all premiums and payments of every nature payable under the terms of the contract have been paid by the Member. There shall be no obligation resting upon the Company or any of its Members, officers or directors other than stated in the policy and application, which together with all indorsements constitute the entire contract. In accepting this policy the Member agrees that any and all benefits provided for herein are conditioned upon same being collected, as set forth herein, from the Members in the form of premiums, payments, deposits or assessments for the purpose of paying approved claims hereunder."

"10. (d) It is also further provided that in the event the Member shall within one year from the effective date of this Policy or from the date of any reinstatement after lapse thereof, die as a result of or caused by, or complicated by any form of the following: Arterio sclerosis, heart trouble, thrombosis, kidney trouble, high blood pressure, tuberculosis, diabetes, cancer, liver trouble, apoplexy or pellagra—then the Company shall be liable for the payment of only twenty per cent of the amount otherwise due hereunder; and if the member shall die, after this policy has been in full and continuous force for more than one year and less than two years, from any of the causes enumerated in this sub-paragraph (d) then the Company shall be liable for the payment of one-half of the benefits otherwise payable hereunder."

"10. (f) No representations not contained in the Application of the Member or in this Policy shall bind the Company or the Member in any way, and there shall be no obligation resting upon the Company, or any of its Members, officers or directors other than stated in the policy and Application. No waiver of any condition or change or alteration of this Policy or the form of application will be valid unless approved by the President or Secretary of the Company and the Member and such approval indorsed thereon. This Policy shall not become effective and be in force until it is delivered and accepted by the applicant while in sound mental and bodily health."

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I, therefore, am of the opinion that the insurance company has no right to extend its schedule of benefits beyond that which is stated in the contracts of insurance.

SURETIES AND SURETY COMPANIES

August 29, 1942.—042-429.

INSURANCE COMMISSIONER—VOLUNTARY DEPOSITS FROM CASUALTY INSURANCE COMPANIES

QUESTION: (1) What authority does the Insurance Commissioner have for accepting from casualty insurance companies, a voluntary deposit of securities not required under the law?

(2) What authority does the Insurance Commissioner have for accepting other than United States Bonds, or bonds of any state, under Section 648.02, Florida Statutes, 1941?

(3) What authority does the Insurance Commissioner have for issuing an official certificate of deposit for a voluntary deposit by a casualty company for the benefit of its policyholders?

To Hon. J. Edwin Larson, State Treasurer and Insurance Commissioner:

(1) It is my opinion that you have no authority whatsoever in your official capacity to accept from casualty insurance companies a voluntary deposit of securities not required under the law.

(2) It is my opinion that you have no authority for accepting other than United States Bonds, or bonds of any state, under Section 648.02, Florida Statutes, 1941, for the section so directs what you shall do.

(3) It is my opinion that you have no authority to issue an official certificate of deposit for a voluntary deposit by a casualty company for the benefit of its policyholders. Such a certificate would be of no effect. The voluntary deposit could be withdrawn at any time and there is no authority in law whereby you can act in your official capacity as a depository of voluntary deposits for a casualty company or anyone.

CHAPTER XXIX

BANKS AND BANKING

INCORPORATION, ORGANIZATION AND POWERS

October 17, 1941.—041-589.

DEPOSITORY BANK—PLEDGE OF COLLATERAL PROTECTING TAX COLLECTOR'S DEPOSIT

QUESTION: Is it the duty of the Tax Collector to release the \$60,000.00 U. S. 3% Treasury Bonds pledged by depository bank to secure the Tax Collector's deposits therein, and would he be relieved of responsibility under bond pledged by depository bank to the Board of County Commissioners?

To Hon. Murray Sams, State Attorney, DeLand, Florida:

I am of the opinion that the Tax Collector should use all diligence possible to protect his deposit of moneys that he is holding as Tax Collector of the County. See *Mort vs. Robinson*, 156 So. 535, and I am of the opinion that it is proper for the Tax Collector to require of the depository bank collateral to secure his deposit; and it would be my suggestion that if the Tax Collector's present bank does not desire to continue the arrangement whereby the depository bank has deposited certain collateral security to secure the Tax Collector's deposits, that the Tax Collector make other arrangements.

In connection with the above, see also Section 6079, Compiled General Laws, Permanent Supplement, Volume 5; *First American Bank and Trust Company et al, vs. Town of Palm Beach*, 117 So. 900.

INCORPORATION, ORGANIZATION AND POWERS

October 22, 1942.—042-496.

LOANS—CONTRACTORS ENGAGED IN WAR WORK

QUESTION: By virtue of the authority vested in the Governor under the Constitution of the State of Florida and by virtue of his oath of office to support, protect and defend the Constitution and Government of the United States and of the State of Florida, has he the power to issue an executive order decreeing that in view of the necessity for a vigorous prosecution of the war if our form of government is to survive, the limitation placed upon the amount that may be borrowed from a state bank or trust company by one individual or corporation shall not apply to war contracts entered into under and within the scope of, Executive Order No. 9112?

To Hon. Spessard L. Holland, Governor:

The Executive Order you mention authorizes:

"The War Department, Navy Department and the Maritime Commission . . . without regard to the provisions of law relating to the making, performance, amendment or modification of contracts, (a) to enter into contracts with any Federal Reserve Bank, the Reconstruction Finance Corporation, or with any other financing institution guaranteeing such Reserve Bank, Reconstruction Finance Corporation, or other

BANKS AND BANKING—Incorporation, Organization and Powers

financing institution against loss of principal or interest on loans, discounts or advances, or on commitments in connection therewith, which may be made by such Reserve Bank, Reconstruction Finance Corporation, or other financing institution for the purpose of financing any contractor, subcontractor or others engaged in any business or operation which is deemed by the War Department, Navy Department or Maritime Commission to be necessary, appropriate or convenient for the prosecution of the war, and to pay out funds in accordance with the terms of any such contract so entered into; and (b) to enter into contracts to make, or to participate with any Federal Reserve Bank, the Reconstruction Finance Corporation, or other financing institution in making loans, discounts or advances, or commitments in connection therewith, for the purpose of financing any contractor, subcontractor or others engaged in any business or operation which is deemed necessary by the War Department, Navy Department or Maritime Commission to be necessary, appropriate or convenient for the prosecution of the war. . . ."

You state:

"There are a number of towns in the state in which only state banks are located. In these towns are certain manufacturing enterprises that are capable of handling important war contracts. The three above mentioned departments of the United States Government desire loans to be made by the local state banks to such manufacturing enterprises in order to facilitate the performance of the contracts and in order to have the local state banks keep a constant check on the contractors with respect to the proper expenditure of the funds."

You will note that the language of the Executive Order permits financing by certain federal institutions and then contains the general language that would apply to any other financial institution. Since I am of the opinion that these loans can be made, as I shall hereinafter point out, I believe that this particular point should be cleared up by an opinion from the Attorney General of the United States. If he should hold that it applied to all other financing institutions, whether federal or not, then I think it would be in order to proceed under this opinion. I do not believe it necessary to give you a direct answer to your question because I have been unable to find any prohibition in our state banking laws from a loan of this character being made provided the Comptroller will promulgate certain rules and regulations with regard thereto. The nearest approach that we have to a loan or a contract in question here is Section 653.18, Florida Statutes of 1941, sub-paragraphs 2 and 3. Sub-paragraph 2 provides:

"It shall be unlawful to loan more than ten per cent of the combined capital and unimpaired surplus of any bank or trust company to any person, firm or corporation (not an officer, director or employee) until it shall have been approved by the board of directors or a duly authorized committee therefrom."

You will note that this is a limitation only upon the powers of the officers of the bank to make a loan of over ten per cent of the combined capital and unimpaired surplus of the bank without the approval of the board of directors.

Sub-paragraph 3 provides:

"Provided that where loans to customers of the institution (not officers, directors or employees thereof) are amply and entirely secured, the ten per cent limitation may be increased to twenty-five per cent of the combined capital and unimpaired surplus."

BANKS AND BANKING—Incorporation, Organization and Powers

This, as you see, removes the ten per cent limitation contained in sub-paragraph 2 and permits the officers of a bank to loan up to twenty-five per cent of the combined capital and unimpaired surplus, when same is entirely secured, without the approval of the board of directors. Therefore, since there is no limitation upon a loan or a contract of the character mentioned, I am of the opinion that since this is a contract with an agency of the government that is engaged in the defense of our country, and therefore the Constitution of the United States and of the State of Florida, it would be proper to enter into same provided that the Comptroller will exercise the prerogatives given him by Section 653.35, Florida Statutes, 1941, which reads:

"The comptroller may from time to time formulate and promulgate reasonable rules and regulations governing the conduct of state banks and trust companies doing business in this state which shall have the force of law and he shall have the power to enforce the same," and make the necessary rules and regulations under which said contracts or loans can be made and that same should be limited strictly to the contracts or loans provided for in the President's Executive Order.

November 19, 1942—042-519.

Supplement to Opinion 042-496 dated October 22, 1942, amending said opinion by striking out all reference to the Comptroller.

To Hon. Spessard L. Holland, Governor:

I have considered your letter of November 6 with regard to my opinion to you under date of October 22. I note that you state you do not feel that the purpose of your inquiry was satisfied by this opinion because "the Comptroller has not promulgated rules and regulations allowing a loan of the character mentioned."

As pointed out in my previous opinion, I take the view that the statute authorizes a loan of this character, and while I felt that it would be well for the Comptroller to make rules and regulations in accordance therewith, this was really done in deference to the construction that he had placed upon the statute and with the idea to recognize him as the proper officer to administer our banking laws. However, I do not think it necessary that the Comptroller do so, and am of the opinion that it would be proper for a state bank to make the loans mentioned in your letter provided all other portions of my opinion, with the exception of the reference to the Comptroller, are complied with.

I might add, with regard to the question of your power to issue an executive order decreeing that the limitation placed upon the amount that may be borrowed from a state bank, appears to me to be improper. First, because the state banks have such authority if the conditions of my letter of October 22 are fulfilled, as pointed out hereinabove, and second, I do not believe that there are sufficient facts to justify your issuing an executive order because of any present emergency. I do not believe that the President's proclamation went sufficiently far to cause me to inquire into the question of your power to issue an executive order under the circumstances.

TRUST COMPANIES

November 20, 1942.—042-526.

**DEPOSITS HELD BY STATE TREASURER—WAR DAMAGE
INSURANCE ON MORTGAGED PROPERTY**

QUESTION: Should the State Treasurer require war damage insurance on property covered by mortgages held by the State Treasurer

BANKS AND BANKING—Trust Companies

as deposits by trust companies under Section 655.10, Florida Statutes, 1941?

To Hon. J. Edwin Larson, State Treasurer:

The foregoing section of the Statutes requires trust companies doing business in this State to deposit with the State Treasurer a sum equal to 25% of their paid-in capital stock, which sum, however, cannot be less than \$25,000.00. This deposit may be in cash, bonds, stocks, or other securities of equal market value, including approved mortgages on real property. The value of the securities is fixed by the State Treasurer, the Attorney General, and the Comptroller. If the aggregate value of such deposited securities exceeds the amount required to be deposited, the trust company may withdraw the excess. If, on the other hand, the aggregate value falls below the required amount, then the trust company is required to deliver additional securities to make up the deficit.

The Statute does not require you to anticipate any decrease in the value of such securities, nor are you required to safeguard said securities other than as custodian thereof.

It is my opinion that you would have no authority to require trust companies to provide the war damage insurance to which your request refers. It is quite probable that the trust companies themselves could require the mortgagors to provide such insurance, and you may with propriety, I think, call the trust companies' attention to the advantages to be gained by having such mortgages fortified by war damage insurance, which suggestion they may or may not follow, as they see fit.

TRUST COMPANIES

August 18, 1942.—042-398.

TRUST COMPANY OF SARASOTA—DELIVERY OF ASSETS OF DIRECTORS BY STATE TREASURER PURSUANT TO ORDER OF CIRCUIT COURT

QUESTION: What procedure should the State Treasurer follow in connection with the decree or order signed by Circuit Judge W. T. Harrison on July 7, 1942, in the liquidation proceedings of the Trust Company of Sarasota and what steps should be taken by the State Treasurer in securing a refund of \$68.50 from said Trust Company to cover expenses incurred by you in connection with said liquidation proceedings?

To Hon. J. Edwin Larson, State Treasurer:

The order you referred to, signed by Judge Harrison, required you as State Treasurer to deed the property therein described to the Directors of the Trust Company of Sarasota and to pay over to them \$3500 which you now hold for said Trust Company. Liquidation and dissolution of trust companies are under the supervision of circuit courts, and the Circuit Judge's order in this instance is your authority and protection for delivering these assets to the Directors of the Trust Company of Sarasota.

Warrant or check should be drawn for the \$3500 payable to the Directors of the Trust Company of Sarasota, naming each of said directors and specifying the group as Directors of the Trust Company of Sarasota. The warrant should then be forwarded to Mr. E. A. Smith, president and one of the directors of said Trust Company.

The deed of conveyance should be a fee simple deed with no warranties, naming the same persons as Directors of the Trust Company of Sarasota as grantees. The deed should then be signed by you as State

BANKS AND BANKING—Trust Companies

Treasurer before two witnesses and acknowledged by you before some officer authorized to take acknowledgments. The deed should likewise bear your seal or the seal you use for your office, and should be forwarded to Mr. E. A. Smith.

With reference to the \$68.50 refund, I doubt if you could compel payment of this item, and for that reason I suggest that you merely request Mr. Smith to have this refund made, informing him of the circumstances under which the expenses were incurred.

TRUST COMPANIES

June 25, 1941.—041-344.

**TRUSTS—DESIGNATION OF CASHIER OF BANK AS TRUSTEE
DESCRIPTIO PERSONAE**

QUESTION: Mr. P. A. Merrin, deceased, by his last will and testament left seventy (70) shares of the capital stock of the Hillsborough State Bank to T. E. Moody, Cashier of the Hillsborough State Bank, or his successors in office, in trust, for the purpose of paying the dividends to a certain named beneficiary during her life and upon her death to be transferred and assigned to certain named beneficiaries absolutely, and thereupon the trust to cease and terminate. The Hillsborough State Bank of Plant City, Florida, is a commercial bank under the laws of this State and as such does not have trust powers. Would Mr. Moody be acting in his representative capacity under the terms of this trust and thereby be violating the law prohibiting commercial banks from acting as trustees?

To Hon. J. M. Lee, State Comptroller:

I am of the opinion that Mr. Moody would not be acting in his representative capacity under the terms of the trust as an officer of the Bank. If the appointment in the will had read "T. E. Moody, as Cashier of the Hillsborough State Bank," I believe a different situation would be presented, but by simply naming him with the designation "Cashier of the Hillsborough State Bank, or his successors in office," I am of the opinion that the words "Cashier of the Hillsborough State Bank, or his successors in office," were merely *descriptio personae*, and were used solely for the purpose of identifying or pointing out the person who was to administer the trust.

Corpus Juris defines the phrase "*descriptio personae*" as:

"A word or phrase used merely for the purpose of identifying or pointing out the person intended and not as an intimation that the language in connection with which it occurs is to apply to him only in the official or technical character which might appear to be indicated by the word." 18 C. J. 968.

The authorities fully substantiate the text. I shall quote from only one.

In *Forester vs. Cantley* (Mo.) 51 S. W. 2d, 550, the facts were: a county official had on deposit in a bank taken over by a State Liquidator, a sum of money. The deposit was in the name of "M. H. Forester, Circuit Clerk." The Court held that the words "Circuit Clerk" were merely *descriptio personae*, and a note owed by Forester individually to the bank was allowed to be set off against the amount due "M. H. Forester, Circuit Clerk" on his deposit.

CHAPTER XXX

COMMERCIAL RELATIONS

NEGOTIABLE INSTRUMENTS

May 8, 1942.—042-235.

WARRANTS—DEATH OF PAYEE PRIOR TO ENDORSEMENT BUT AFTER TRANSFER—RIGHTS OF TRANSFEREE

QUESTION: A State Welfare warrant, not endorsed, was delivered to a grocer in payment of an account, the payee in said warrant thereafter dying. Does the money represented by said warrant go to the estate of the payee? Does the delivery of the warrant by the payee to the grocer prior to payee's death give the grocer any right to a claim against the State Welfare Board?

To Hon. Herbert D. Beck, P. O. Box 67, Belle Glade, Florida:

On June 11, 1938, former Attorney General Gibbs rendered an opinion in which he held that where an allowance was made by the State Welfare Board, and the warrant was issued and forwarded to the payee prior to his death, the amount of funds represented thereby upon the death of the payee became a part of the assets of the payee's estate. I concur in this former opinion.

However, in the situation you describe, the payee apparently disposed of her rights in the warrant and the money represented thereby, by delivery of the warrant to her grocer prior to payee's death.

Section 6808, Compiled General Laws, 1927, provides that where the holder of an instrument payable to his order transfers it for a valuable consideration without endorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires in addition the right to have the endorsement of the transferer. This statute further provides that for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the endorsement is actually made. Thus the question would arise as to whether the transferee is a holder in due course and how that fact may be established. Since you are familiar with the facts you probably will be able to determine whether or not there may have been some other assignment of the warrant in question which would have any effect on the grocer's rights as a holder in due course.

When this warrant is presented for payment, the State Treasurer will have to be satisfied concerning either the endorsement thereon or the lack of an endorsement before he pays the same. Likewise, the State Comptroller, the State Welfare Board, and a representative of the Federal Social Security Board will have to be satisfied in this connection. It might be well, therefore, for you to contact the State Welfare Board direct and ascertain the Board's attitude on the payment of this warrant. The State Welfare Board will, I believe, be able to ascertain from the Federal representative just what the Social Security Board's attitude will be.

COMMERCIAL RELATIONS—Negotiable Instruments
NEGOTIABLE INSTRUMENTS

August 21, 1941.—041-467.

WARRANTS—ENDORSEMENTS

QUESTION: Warrants are presented to the State Treasurer for payment endorsed in the name of the payee of such warrant by an attorney or some other supposedly authorized person, the endorsements on the warrants in all instances being guaranteed by one of the banks that clear regularly with the office of the State Treasurer. Does the endorsement of the bank, which carries a provision guaranteeing all previous endorsements, cover and guarantee the authority of the person who endorses in the name of the payee?

To Hon. J. Edwin Larson, State Treasurer:

Such an endorsement does not guarantee the authority of the person who endorses in the name of the payee.

I am reluctant to so rule because the same is contrary to the general rule of law relating to banks and banking and to the negotiable instrument law. (Volume 1, Zollman on Banking, Endlich vs. Bank of Black Creek, 227 N. W. 866. Market Street Title and Trust Company vs. Chelton Trust Company, 145 Atl. 848.) But in view of the ruling of our Supreme Court in the case of Capital City Bank of Tallahassee vs. Lewis State Bank, 197 So. 528, I feel that in order for you to be protected I can only advise you not to rely on the guarantee of such an endorsement.

CHAPTER XXXI

ESTATES OF DECEDENTS

FLORIDA PROBATE LAW

August 11, 1941.—041-444.

CLAIMS—FILING—PAYMENT OF FEE

QUESTION: Should a court hold in total disregard a claim against an estate deposited with it by a claimant during the statutory period for filing claims against the estate, without the proper filing fee, however, and the claim consequently not marked, filed and docketed, when the personal representative of the estate applies for distribution and for his discharge? In other words, should a claim against an estate be considered filed when deposited with the proper court, even though the claimant declines or refrains from paying the proper filing fee therefor?

To Hon. John G. Baker, County Judge, Orlando, Florida:

Section 5200, Compiled General Laws, provides what fees shall be collected by the County Judge in matters relating to probate and the administration of estates and provides, further, "for all other additional matters same fees as Circuit Court Clerk." This statute in nowise makes the prepayment of fees to the County Judge a condition precedent to the effectiveness of the filing of any papers.

There are certain statutes relating to the Clerk of the Circuit Court which provide for recording of legal instruments and provide, further, that fees for recording any such instruments shall not be payable to any officer who may have recorded such instrument until he has verified the record and endorsed this fact upon the original instrument. However, inasmuch as we are not dealing with the recording of instruments but rather with the filing thereof, it is my opinion that Section 4863, Compiled General Laws, wherein this provision is contained, is not applicable to the present situation.

In the case of *In re Switzer's Estate*, 115 Fla. 780, 156 So. 1, the Supreme Court was considering the question of what constituted a filing in the Office of the County Judge. In that particular case, an attorney had deposited with an employee in the Office of the County Judge a certain paper to be filed in the County Judge's Court. The employee retained such paper in his possession over the weekend and filed the same on Monday morning, Saturday being the last day for such filing. In its opinion, the court said:

"A paper is not filed unless it is not only deposited with the proper officer but is received by him into his official custody . . .

"Until a paper is received at the proper place, to be there put on file as part of the records of an office in which it is required by law to be not only filed but also kept, the filing is not complete although the responsible officer may have personally received, at some unofficial place, the actual physical custody of the document proposed to be filed."

In the case of *Coult vs. MacIntosh Investment Company*, 133 Fla. 141, 182 So. 594, the court held that a paper is "filed" when delivered to the proper officer and received by him to be kept in his official custody.

ESTATES OF DECEDENTS—Florida Probate Law

From the foregoing cases, it would appear that in order to constitute a sufficient filing in the Office of the County Judge, all that is necessary to be done is to have the paper received for filing by the County Judge or by his duly authorized deputy. However, nothing was said in the foregoing cases about the payment of fees and the question arises—would the situation be changed if the County Judge had demanded his fee prior to the time of the filing and payment thereof had been refused?

In the case of *Sweat, Sheriff, vs. Waldon*, 123 Fla. 478, 167 So. 363, a summons in chancery was issued from the Circuit Court of the Eighth Judicial Circuit directed to certain defendants residing in the Fourth Judicial Circuit, namely, Duval County. The summons was sent to the Honorable Rex Sweat, as Sheriff of Duval County, to be served upon the proper parties. Upon receiving the summons, the Sheriff notified counsel for the plaintiff that his office operated upon a cash basis and that, upon receipt of \$2.20 from the plaintiff, service would immediately be made.

During the lapse of time necessary to carry on the correspondence between plaintiff and Sheriff, the effective time within which the summons should be served had transpired. The plaintiff filed a motion against the sheriff for a rule to show cause why a certain penalty provided for in the statutes should not be imposed against him. The rule was issued in response to the motion and eventually a judgment imposing a penalty in the sum of One Hundred Dollars on the Sheriff was entered in favor of the plaintiff. On certiorari in the Supreme Court, that court discussed this question—"Had the Sheriff of Duval County the right to demand compensation in advance for his service in executing the summons?"

The Court held that the Sheriff did have the right to operate his office on a cash basis if he so desired, upon the theory that the State had an interest in the collection of fees by the Sheriff inasmuch as any surplus, over and above an amount necessary to run the Sheriff's office must be remitted to the State. The Court noted that the Sheriffs of this State were required to operate their offices under a budget system and that the State audited their accounts annually, requiring a full and complete report from all Sheriffs of all moneys or fees received. In closing its opinion, in that case, the court said:

"It is competent for the Legislature to impose such a requirement (compensation for service of process, in advance) and when all Acts affecting the Sheriff's office are read together, it has, to all intents and purposes, done so."

In view of the foregoing case, it is my opinion that inasmuch as there are statutes requiring the County Judge to make an accounting of all moneys received by him, in the operation of his office, not only to the County Commissioners but also to the Comptroller of the State, and in view of the fact that all fees received by the County Judge, over and above a designated amount, must be remitted to the State, a County Judge may also "operate his office on a cash basis."

It is, therefore, my opinion, on the basis of the authorities hereinbefore cited, that where a claim against an estate is delivered to the County Judge for filing, and the County Judge demands or requests payment of the filing fee, prior to the filing of said claim, that such fee must be paid before the filing becomes effective. On the other hand, if the County Judge does not request prepayment of the filing fee, the filing is complete upon delivery of the claim to the County Judge, in his official capacity, to be retained by him as part of the public records of his office.

ESTATES OF DECEDENTS—Florida Probate Law**FLORIDA PROBATE LAW**

September 4, 1942.—042-435.

ESCHEATED ESTATES—ORDER OF ESCHEATMENT

QUESTION: Should the State Treasurer demand an authenticated copy of order of escheatment before making official entry of such an item and issuing his official receipt therefor?

To Hon. J. Edwin Larson, State Treasurer:

The statute relating to escheated estates merely requires that the property of such estate be converted into money and paid to the Treasurer of the State of Florida and by him deposited in the State's school fund. No authenticated copy of the order of escheatment is required to accompany the payment in such cases to the State Treasurer, nor, in my opinion, could you require one as a condition precedent to accepting such payment. However, it is reasonable to require and secure such authenticated copy whenever possible.

FLORIDA PROBATE LAW

June 10, 1942.—042-289.

ESCHEATED ESTATES—REFUNDS

QUESTION: Should warrant be issued in the amount of \$653.04 to W. W. Sinclair as Administrator of the Estate of John Stranahan, deceased, as required by order of the county judge of Charlotte County, Florida?

To Hon. J. M. Lee, Comptroller:

The \$653.04 was paid to the State Treasurer by W. W. Sinclair as curator of the estate of John Stranahan, deceased, on May 22, 1935, under a supposed escheatment. The statute providing for escheatment and the statute authorizing the appointment of a curator of an estate do not contemplate or authorize such curator to pay the assets of the estate to the State Treasurer under the escheatment proceedings. This attempted escheatment was not pursuant to statute, and was, in my opinion, subject to revocation by the County Judge who authorized it in the first place.

W. W. Sinclair, the former curator, has now been appointed administrator of this estate, and his petition for the return of this money shows that heirs or persons claiming to be heirs of the said John Stranahan have appeared and claim the assets of said estate.

The statute relating to escheatment authorizes any heir or legal representative having a right to the assets of an escheated estate to appear and prove his right thereto, whereupon the State Treasurer shall order the funds reimbursed to such heir or legal representative.

The County Judge of Charlotte County, Florida, having jurisdiction of this estate, has said that W. W. Sinclair as administrator is entitled to reimbursement of these funds.

The answer filed in this proceeding by the State Treasurer reserves the right on behalf of the State of Florida to apply for and enforce a proper escheatment in the event the supposed heirs do not maintain their claims as such heirs.

It is therefore my opinion that warrant should issue in the amount of \$653.04 to W. W. Sinclair as administrator of the estate of John Stranahan, deceased.

CHAPTER XXXII

DOMESTIC RELATIONS

GUARDIAN AND WARD

November 26, 1941.—041-664.

GUARDIAN—APPOINTMENT—FORM

QUESTION: By whom and in what form should an appointment of guardian be made to entitle citizens and residents of this State to admission to the Florida State College for Women?

To Hon. J. T. Diamond, Secretary, Board of Control:

Section 5884, C. G. L., 1927, provides:

"The mother jointly with the father shall be the natural guardian of their children during infancy, and they jointly may appoint guardians for their children during any part of infancy by deed of writing attested by two witnesses or by last will and testament. . . . In the event of the death of either natural parent, the sole guardianship of the natural children of such parents shall pass to the survivor and thereafter vest in him or her solely, even though the survivor thereafter remarry. The surviving father or mother solely shall have the right to appoint guardians for his or her natural children by deed in writing or by last will and testament as aforesaid, after the death of the other natural parent. . . ."

It, therefore, appears that the mother and father should execute the deed of appointment jointly, if both are living.

CHAPTER XXXIII

CRIMES

WEAPONS AND FIREARMS

October 31, 1942.—042-507.

FORFEITURE AND SALE AFTER CONVICTION

QUESTION: If the Clerks of the Circuit and Criminal Courts and the Sheriffs, have in their possession pistols and revolvers which have been held as evidence in criminal cases, can the same be made available to the military department of the state for use by the defense force?

To Hon. John M. Allison, Assistant County Attorney, Tampa, Florida:

The procedure for the disposition of such firearms is set forth in the provisions of Section 790.08, Florida Statutes, 1941:

"The officer making any arrest under the preceding sections shall take possession of any arms or weapons found upon the person arrested, and shall retain the same until after the trial of such person, and if he be convicted, said arms or weapons shall be forfeited, and the sheriff shall sell the same at public sale and account for and pay over the proceeds thereof as in the case of fines collected, but, if such person be acquitted, the said arms or weapons shall be returned to him."

It is my opinion that upon the conviction of the person charged with the unlawful use or possession of weapons, or charged with an offense wherein the use of a weapon was incidental to the commission of the same, and an order of forfeiture of such weapons having been duly entered by the Court, it is the duty of the Clerk of the trial Court to deliver such weapon to the Sheriff.

The statute does not clothe the Sheriff with authority either to lend or give away the weapon to any organization, but specifically directs and requires that he shall sell the same at public sale and account for the proceeds.

ARSON

August 15, 1941.—041-447.

PROSECUTION—PREDICATE FOR CHARGE

QUESTION: In the event a person unlawfully sets fire to furniture or other personal property within a building, to what extent must the building be affected by fire to lay a predicate for a charge of arson under the laws of Florida?

To Hon. J. Edwin Larson, Insurance Commissioner and State Fire Marshal:

Section 7208 (8) Compiled General Laws of Florida, Permanent Supplement, provides:

"Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, whether occupied, unoccupied, or vacant, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging or adjoining thereto, whether the property of himself or of another,

CRIMES—Arson

shall be guilty of arson in the first degree, and, upon conviction thereof, be punished by imprisonment in the State prison for not more than twenty years."

The Supreme Court of Florida, in construing the above section, in the case of *Hurst et al vs. State*, 160 So. 355, held:

"Under the statute, the setting fire to or burning, or the causing to be burned, constitutes arson when the subject to which the fire is set, or which burned or is caused to be burned, is a building named in this section of the Act."

It is my opinion that the manner in which the fire is applied or started is immaterial. If the fire is wilfully and maliciously set and the result is the burning or any charring of the wood of a dwelling house, whereby the fiber of the wood is destroyed, such would be a sufficient burning as to constitute arson under the provisions of the above section.

WORTHLESS CHECKS

June 24, 1942.—042-316.

CRIMINAL PROSECUTION—CHECK RETURNED BY BANK MARKED "INSUFFICIENT FUNDS"

QUESTION: Under Chapter 21000, Acts of 1941, would a criminal prosecution be justified where the check was written and delivered after the party giving the check had secured the property?

To Hon. Chester B. McMullen, State Attorney, Clearwater, Florida:

Section 1 of said Chapter 21000, among other things, provides:

"Section 1. Any person who, with intent to defraud, shall make, utter, draw, deliver, or give any check, draft, or written order upon any bank, person or corporation, and who secures money, property, or other thing of value therefor, . . . shall be guilty of a felony, . . ."

Your letter states that the fruit was picked and hauled on the promise of immediate payment, and failing in this, the purchaser issued the check two or three weeks later, which was returned by the bank marked "Insufficient Funds."

I therefore conclude that the alleged offender obtained the fruit merely on his representation that he would make payment therefor immediately on same being picked and hauled; that no definite form of payment had been agreed upon, and that no property or thing of value was secured at the time of or in return for the giving of the check.

On the authority of *Nash vs. State*, 118 Fla. 875, 160 So. 385, wherein our Supreme Court held that statutes governing such subject "are penal statutes and must be strictly construed," it is my opinion that a criminal prosecution based on such facts would not be justified.

GAMBLING

July 1, 1941.—041-352.

LOTTERY—BREAD CONTAINING CASH PRIZES

QUESTION: Is it a violation of Sec. 7667, Compiled General Laws 1927 for a bakery company to advertise its bread for sale, at no increase in sales price, with the assurance to the public that in each loaf of bread purchased will be found a sum of money not less than one cent nor more than one dollar?

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To Hon. Chester B. McMullen, State Attorney, Clearwater, Florida:

The offense of lottery is composed of three elements, viz: prize, award by chance, and consideration. The existence of the first two elements of lottery in this type sales program is self-evident. With reference to the third element, in my opinion, the increased volume of business and the greater profits thereby obtained, constitute a consideration accruing to the benefit of the bakery company. See *Little River Theatre Corp. et al vs. State ex rel. Hodge*, 185 So. 855. It is therefore my opinion that the advertising and sale of bread under the circumstance above described, constitute a lottery.

GAMBLING

February 28, 1941.—041-108.

COCKFIGHTING—LEGALITY

QUESTION: Is cockfighting and the training of game cocks for fighting legal?

To Hon. Spessard L. Holland, Governor:

The pertinent sections of Chapter 4971, Acts of 1901, now appearing in the Revised General Statutes as Sections 5244, 4982 and 5250 (C. G. L. 7363, 7071 and 7369) are as follows:

"Whoever unnecessarily overloads, overdrives, torments, deprives of necessary sustenance or shelter, or unnecessarily or cruelly beats, mutilates or kills any animal, or causes the same to be done . . . shall be punished," etc.

"In this Chapter (R.G.S. Compilation) and in every law of the State relating to or in anyway affecting animals, the word 'animal' shall be held to include every living dumb creature, and the words 'torture', 'torment', and 'cruelty' shall be held to include every act, omission or neglect whereby unnecessary or unjustifiable pain or suffering is caused, except when done in the interest of medical science," etc.

"Any sheriff, constable or any other peace officer of the State, or any police officer of any city or town of the State, shall arrest without warrant any person found violating any of the provisions of the last six preceding sections" (which include the sections first above quoted) "and the officer making the arrest shall hold the offender," etc.

In the light of the above quoted statutes and common knowledge of the nature of the sport of cockfighting and its effects upon the "animals" used therein, it is my opinion that the holding of cockfighting mains, the term usually applied to tournaments in which numbers of game cocks are matched against each other in a series of battles, and for which the birds are equipped with the dangerous instruments, described in the last paragraph of this letter, is illegal as a violation of the laws of Florida, relating to cruelty to animals—the statutes quoted.

Whether the wagering of money or other thing of value on the outcome of cockfights comes under the ban of the laws relating to gambling, I am in doubt because the latter laws relate to contests of skill, speed, power or endurance of man or beast, and game cocks are neither.

As to the training of game cocks for fighting, I am of the opinion that such would not be unlawful unless conducted in such a manner as to constitute cruelty to animals in contemplation of the statutes quoted, *supra*. Ordinarily, as the writer understands, training is done without the use of the lethal weapons with which game cocks are equipped for

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mortal combat—needle-pointed shafts of steel, called gaffs, firmly fastened to the spurs with which the fowls, legally yclept animals, are by nature endowed and which are trimmed and shapened to fit the gaffs and thus render less effective to inflict damage to the adversary.

GAMBLING

June 16, 1941.—041-334.

COIN OPERATED DEVICES—LEGALITY

QUESTION: Is a machine in the nature of a slot machine having a bar which trips certain combinations on a roller upon depositing of a coin and the pulling of the handle, the result being either the player secures nothing or may receive a token which can be traded for a package of merchandise, illegal as constituting a gambling device?

To Hon. J. W. Hunter, State Attorney, Tavares, Florida:

In view of the ruling of our Supreme Court in the case of *Kirk vs. Morrison*, 146 So. 215, and *Paternack vs. Bennett*, 190 So. 56, it is my opinion that such machine is illegal as the same constitutes a gambling device.

GAMBLING

September 22, 1941.—041-537.

COIN OPERATED DEVICES—LEGALITY

QUESTION: Does Chapter 20956, Acts of 1941, make lawful the licensing and operation of slot machines and coin operated devices whether or not they have any automatic pay-off feature, which machines or devices can be, but are not in fact, used for gambling purposes?

To Hon. G. A. Worley, State Attorney, Miami, Florida:

In my opinion Chapter 20956, which takes effect on October first of this year, does not repeal the provision of Chapter 18143, Acts of 1937, prohibiting slot machines and devices which are adapted for gambling. The language in the 1941 Act, that the Act should not be construed to authorize the use of any machine, contrivance or device for gambling or as a game of chance, seems to me to express the intention of the Legislature not to change the existing gambling statutes. If this language, however, were to be construed to mean that machines adapted for use in gambling, though not actually used for gambling purposes, were to be lifted out of the prohibition in the 1937 Act, then such a provision in my opinion would be void for there is not the slightest hint in the title of the 1941 Act of any intention to change the gambling laws of this State, the title referring only to the intention to amend an Act relating to license taxes.

GAMBLING

November 20, 1942.—042-529.

COIN OPERATED DEVICES—LEGALITY

QUESTION: Since the 1941 Act (Section 19, Chapter 20956, Laws of Florida, Acts of 1941), and the subsequent opinions of the Supreme Court (*Stoutamire vs. Pratt*, 5 So. 2d 248), is a marble game that gives free plays upon reaching a certain high score, with no other award or prize, other than the free plays, being operated in violation of Chapter

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18143; also would there be any difference in the use of such machine, if the free plays had to be played out by the user, or a punch button was attached to the machine which could release such free plays?

To Hon. Spessard L. Holland, Governor:

Attention is directed to the provisions of Section 849.16, Florida Statutes 1941, wherein it is provided that:

"Any machine or device is a slot machine or device within the provisions of this chapter if it is one that is adapted for use in such a way that, as a result of the insertion of any piece of money or coin or other object such machine or device is caused to operate or may be operated, and by reason of any element of chance or of other outcome of such operation unpredictable by him, the user may receive or become entitled to receive any piece of money, credit, allowance or *thing of value*, or any check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance or thing of value, or which may be given in trade, *or the user may secure additional chances or rights to use such machine, apparatus or device*, even though it may, in addition to any element of chance or unpredictable outcome of such operation, also sell, deliver or present some merchandise, indication of weight, *entertainment or other thing of value.*" (Italics ours.)

The machine referred to has been licensed under the provisions of Section 205.63, Florida Statutes 1941. The pertinent provisions of said Section are:

"... This section shall license all coin operated machines, contrivances or devices operated for amusement and that do not dispense *any form of prize or reward*, but shall not be construed to authorize the use of any machine, contrivance or device for gambling or as a game of chance." (Italics ours.)

Whenever any coin-operated device is so adapted that, as a result of its operation, the player may by the operation of an element of chance become entitled to receive free plays on such machine, the machine, by awarding to the player such free plays, has awarded to him a prize, namely, amusement. Amusement incident to such free plays on such machine is recognized by the Courts to be a thing of value to the player. It must be that amusement or entertainment furnished the player of the marble board in question is worth something to him, if it constitutes the inducement for him to operate the machine. If the owner of the machine expects the amusement or entertainment furnished by the operation thereof to constitute an inducement for one to play, then it must be that the owner considers amusement to be of some value to the player.

The situation, in my opinion, would be no different if, instead of awarding the player five free plays, the machine disbursed to him a sum of money equal to five times the value of one play.

The machine described cannot be said to be within the purview of Section 205.63, *supra*, for the reason that the outcome of any operation of such machine is unpredictable by the player, and that by reason of such unpredictable outcome, he may become entitled to receive the right to play the machine free, which right is a thing of value.

It is my opinion, therefore, that the coin-operated marble board referred to is a slot machine within the purview of Section 849.16, *supra*. This conclusion follows, irrespective of whether the machine has attached to it a device whereby the accumulated free plays might, for some peculiar reason, be released.

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GAMBLING

April 29, 1942.—042-208.

COIN OPERATED DEVICES—SEIZURE AND CONFISCATION

QUESTION: Has a sheriff the right to confiscate coin operated machines, contrivances or devices licensed by the Tax Collector where gambling on them is permitted?

To Hon. Todd Tucker, Sheriff, Pinellas County, Clearwater, Florida:

While Chapter 18143, Acts of 1937 (The Anti-slot Machine Act) provided that all coin operated machines with an unpredictable result, adapted for gambling purposes, were contraband, the 1941 Legislature, by Chapter 20956 (a Revenue Act) permits the use and operation of said machines by authorizing and permitting a license to be issued therefor. Said Chapter 20956 did not specifically repeal, and it affirmatively appears from the said Revenue Act that the Legislature did not intend to repeal Chapter 18143 because provision is made by Section 19 thereof, among other things, as follows:

"This section shall license all coin operated machines, contrivances or devices operated for amusement and that do not dispense any form of prize or reward, but shall not be construed to authorize the use of any machine, contrivance or device for gambling or as a game of chance. . . ."

The Supreme Court of Florida, in *Stoutamire, Sheriff vs. Pratt*, 5 So. 2d 248, in construing the provision of Section 19, Chapter 20956, Laws of Florida, Acts of 1941, which licensed coin operated machines, stated:

"... the legislative intent was to make it clear that machines of this sort should be lawful so long as they are not used for gambling and that so long as such machines are not used for gambling, they may be operated under the license provided for in the latter Act."

And the Court further held:

"The machine described in the bill of complaint unquestionably can be used as a means for gambling on an unpredictable result, but as long as it is not used for that purpose, but merely as a matter of amusement for those who play it, we think the legislature has made its use lawful by the phraseology used in the 1941 statute, supra."

From the foregoing quoted 1941 statute and *Stoutamire* case I conclude that when a licensed machine is used for gambling purposes it again becomes subject to the provisions of the 1937 Act.

It is my opinion that if the coin operated machine or device dispenses any form of prize or reward it is not a proper machine to be licensed, is contraband and is subject to seizure and forfeiture as provided for by Chapter 18143, Acts of 1937.

If said machine does not dispense any form of prize or reward and has been licensed under the above mentioned statute for amusement purposes only, if a player of such machine uses it for gambling purposes he should be prosecuted under Section 5508 R. G. S. (Section 7666 C.G.L.) or Section 5514 R. G. S. (Section 7672 C.G.L.) for gambling.

If such licensed machine is used for gambling purposes with the knowledge or consent of the owner, clerk, servant or operator of the location of such machine, the person permitting or consenting to the use of such machine for gambling purposes should be prosecuted under Section 5499 R. G. S. (Section 7657 C.G.L.) or Section 5500 R.G.S. (Section 7658 C.G.L.) for maintaining a gaming table, etc.; and the amuse-

CRIMES—Gambling

ment device may be seized under either Chapter 18143, Acts of 1937, or Section 5507 R. G. S. (Section 7665 C.G.L.) to be used as evidence, and afterwards disposed of under the order of the court.

A case might arise where the owner or operator of the location of such machine might question the seizure, disclaiming on his part any knowledge or consent of the machine being used for gambling purposes. As to this particular set of facts, it is my opinion that inasmuch as the machine is licensed only for amusement purposes, the owner or operator, knowing that it can unquestionably be used for gambling, is charged with the duty of seeing that the machine is only used within the scope of the purpose for which it was licensed. The garments of legitimacy clothe the machine only so long as the same is used for the purpose for which it was licensed by the State, such purpose being for amusement only; and when used for a purpose other than amusement (gambling) the machine may be seized and held for use in connection with any investigation, prosecution or other proceedings, and for disposition under order of court, as provided for by said Chapter 18143, Acts of 1937.

"DRUNKEN DRIVING LAW"

July 29, 1941.—041-408.

ENFORCEMENT—BEVERAGE DEPARTMENT

QUESTION: Is the Beverage Department charged with the enforcement of Section 7749, Compiled General Laws of 1927?

To Hon. E. W. Scarborough, Director, Beverage Department:

Your department is primarily responsible only for the administration of the laws of Florida governing the sale, possession, transportation, manufacture and taxation of intoxicating beverages and those dealing therein, and for such purposes the Director and Supervisors of the Department are vested with the powers of the several Sheriffs and their deputies.

I find no specific duty imposed upon your department to enforce the statute named and referred to by you as the "Drunken Driving Law."

FICTITIOUS NAME STATUTE

September 16, 1941.—041-534-1.

INTERPRETATION

QUESTION: If John Jones owns and operates an apartment house known as the Florida Apartments, all leases being executed in the name of Mr. Jones and all business transactions being in his name and not in the name of the Florida Apartments, is the fictitious name law applicable to him?

To Hon. Hunter G. Johnson, Hotel Commissioner:

In my opinion, the answer to your question specifically stated is, the Act is not applicable. The Act is only intended to apply to those persons who engage in business under a fictitious name. In other words, if the leases were executed in the name of the Florida Apartments, or credit was extended in the Florida Apartments, then the Act would be applicable. The determining factor as to when the Act is applicable to a person is to be found in answer to the question, does the person engage in business under a fictitious name?

CRIMES—Fictitious Name Statute

September 24, 1941.—041-534.

QUESTION: Insofar as the same is applicable to apartment house owners, what is the construction and interpretation of the Fictitious Name Law, being Chapter 20953, Acts of 1941?

To Hon. Hunter G. Johnson, Hotel Commissioner:

Supplement to Opinion dated September 16, 1941.

In my said opinion of September 16, I stated that the Act was applicable to persons who *engage in business* under a fictitious name. The Act can very easily be applicable to an apartment house owner or operator if he uses a fictitious name in the business of operating the apartment. What constitutes *engaging in business under a fictitious name* is sometimes very difficult to determine. I stated in my opinion of September 16, which I re-affirm, that the mere fact that a person owns and operates an apartment house which has the name over the door of "Florida Apartment" does not of itself bring the owner or operator within the provisions of said Act. If the owner or operator advertises his apartment under the name of "Florida Apartments" or carries a listing in the telephone directory under such a name or signs leases in that name or has credit extended in the name of the apartment, or in innumerable other instances, all of which I cannot at this moment enumerate, the law is applicable.

FICTITIOUS NAME STATUTE

May 15, 1942.—042-241.

FICTITIOUS NAME—ASSIGNMENT OR CANCELLATION AFTER REGISTRATION

QUESTION: Has the owner of a fictitious name the right to assign or cancel it after registration in the office of the Clerk of the Circuit Court under the Fictitious Name Law?

To Hon. E. B. Leatherman, Clerk, Circuit Court, Miami, Florida:

The term "fictitious name," as used in the above act, is substantially co-extensive with the term "trade-name," which is usually applied to a business and its good will. Trade-names are personal property and may usually be sold and assigned as other property, however, where a trade-name has come to represent, to the general public, that the personal care and skill of an individual is used in the conduct of the business and cannot truthfully be used by another, then that trade-name cannot usually be assigned.

The mere fact that a trade or fictitious name has been registered under Chapter 20953, Acts of 1941, does not prohibit its sale and assignment, but when sold and assigned the assignee should re-register the same under his own name; this might be required by the sales contract. When a trade or fictitious name has been re-registered under the name of another I see no reason why a notation of the re-registration could not be made upon the former registration. Where the business is sold but the trade or fictitious name is not transferred with it I see no reason why a notice of such transfer of the business, in the nature of a notice by a retiring partner, should not be published to notify the public that the person publishing the notice has no further connection with the business. I know of no method of actually cancelling the registration, however a copy of the above notice might be recorded and reference thereof made on the registration.

This is not an official opinion but is given merely for your information.

CRIMES—Fictitious Name Statute**FICTITIOUS NAME STATUTE**

December 2, 1941.—041-681.

REGISTRATION—CORPORATIONS, PARTNERSHIPS, TRADE NAMES, ETC.

QUESTION: How does the "Fictitious Name Statute," Chapter 20953, Acts of 1941, apply in the use and registration of certain names and variations thereof?

To Florida Industrial Commission:

The use of fictitious names in the operation of various businesses has long been the subject of legislation in at least a dozen or more states, apparently for the purpose of affording protection to the public from the uncertainties of commerce with individuals or partnerships not readily identifiable from the business name used.

The Florida "Fictitious Name Statute" is quite similar to the Fictitious Name Statute of other states. By its title it is an Act requiring all persons engaged in business or professions in the State of Florida, except corporations, using other than their own proper names, to register the trade name or whatever name they are doing business under, and the extent of the interest of all persons concerned, with the Clerk of the Circuit Court of the County where the principal place of business is located.

Persons affected by the Act are defined in Section 2 thereof as every individual, whether natural or artificial, firm or group, or combination of individuals, or partnerships, whether natural or representative, except corporations.

Fictitious names are defined by the Act to include any trade name, whether a single name or a group of names, other than the proper name or known called names of those persons engaged in such business or professions.

In one of your questions you say that the Twelfth Avenue Corporation, Inc., operates a business known as The Colonial Inn, and you inquire in this connection if a corporation not operating under its corporate name is subject to the provisions of the "Fictitious Name Statute."

Both in the title and in Section 2 of the Act corporations are specifically excepted from the provisions of the Statute. It is, therefore, my opinion that no corporation is required to register under the Act, regardless of what name it may use in its business operations.

You further say that John Doe operates a business known as John's Filling Station, or Honest John's Filling Station, and you inquire if either of such names should be registered. It is my opinion that the phrase, "proper name or known called names of those persons engaged in such business or profession," as used in the Act, refers to the surname or last name of such persons. Therefore, in my opinion, any name used by a business or profession which discloses only the first or given name of the owner or operator of such business, should be registered under the Act.

By way of illustration, you further say that John Doe and Richard Roe operate a business as co-partners under the name of John Doe Company. In my opinion this name is not sufficient to give notice as to parties interested in the business. No indication is given that Richard Roe is in any way connected with such business. Therefore, in my opinion, such name should be registered as required by the Act. Where-

CRIMES—Fictitious Name Statute

ever two or more persons having different surnames are interested in the same business, which is operated under a name which includes the surname of one of the parties only, then, in my opinion, such name should be registered under the Act.

You suggest that John Doe Company is a corporation which has been dissolved by proclamation of the Governor, but its operations are continued in the name of the corporation. You inquire in this connection whether or not such corporate name should be registered if the operator thereof is someone other than John Doe. Where a corporation has been dissolved by proclamation of the Governor, its corporate existence is terminated and the corporation as such, after being dissolved, has no further corporate rights and is not authorized to transact any business as a corporation. If, then, business is continued in the corporate name, the operators thereof must, in my opinion, register such name under the "Fictitious Name Statute," unless the corporate name so used includes the proper name of the person or persons so operating the business.

Where the business name used includes the surname of all parties interested in the business, such business name, in my opinion, need not be registered under the Act. For example, Rutlan Brothers is operated by Herbert Rutlan and Nat Rutlan. Such a name need not be registered under the Act. In the foregoing illustration, if Rutlan Brothers is operated by Herbert Rutlan, the survivor of two brothers who formerly operated such business, then, in my opinion, the name fully identifies the known or proper name of the proprietor, and need not be registered under the Act.

In my opinion, a partnership composed of John Doe and Richard Roe, operating under the firm name of Doe & Roe, is not a fictitious name and need not be registered under the Act.

Green Apartments is operated by Stone Investment Company. If Stone Investment Company is a corporation, it is exempt, and the name, Green Apartments, need not be registered. However, if Stone Investment Company is a partnership, then the name, Green Apartments, as well as the name of the partnership, must be registered under the Act.

John Doe & Son, owned by Harry Doe but operated by H. A. Samson as curator for Harry Doe, is a fictitious name because the curator is the responsible party and the one engaged in such business rather than the actual owner thereof, and such name should, in my opinion, be registered under the Act. This will likewise apply where the business is operated by an administrator, executor or trustee.

The foregoing illustrations comprehend the various situations described by you as well as a few others. They apply to professions as well as ordinary commercial enterprises, and will, I hope, suffice to give you the information desired with reference to the construction and interpretation of our "Fictitious Name Statute."

CHAPTER XXXIV CRIMINAL PROCEDURE

PRELIMINARY EXAMINATION

January 15, 1941.—041-3.

DEPUTY SHERIFFS—WITNESS FEES

QUESTION: Does Section 43 (d) of the Criminal Procedure Act (Chapter 19554, Acts of 1939) apply to deputy sheriffs paid for their service by the sheriff?

To Hon. W. M. Wainwright, State Auditor:

Section 43 (d) of Chapter 19554, Acts of 1939, reads as follows:

"(d) No sheriff, deputy sheriff, constable, deputy constable, highway patrolman, or other person employed or paid by the State or any county thereof as a law enforcement officer, shall be entitled to witness fees or to mileage when summoned to testify in any court sitting in the county in which he holds office, is employed, or has his residence."

It is my opinion that the clause, "or other person employed or paid by the State or any county thereof as a law enforcement officer," was not intended to, and does not qualify the preceding named officers, but was intended to add to the classification of persons not entitled to witness fees or mileage, all persons employed or paid as law enforcement officers by the State or county.

In other words, the right of sheriffs and their deputies, constables and their deputies, and highway patrolmen, is in no way affected by the inclusion of the clause, "or other person employed or paid by the State or any county thereof as a law enforcement officer."

If this is the proper construction to be placed on Section 43 (d) of Chapter 19554, it follows that neither sheriffs, deputy sheriffs, constables, deputy constables, or highway patrolmen, are entitled to witness fees or mileage, when summoned to testify in any court sitting in the county in which such witness holds such office, is employed, or has his residence, and I so hold.

PRELIMINARY EXAMINATION

February 21, 1941.—041-83.

DEPUTY SHERIFFS—WITNESS FEES

QUESTION: Is a deputy sheriff entitled to witness fees or to mileage when summoned to testify in the Courts of St. Lucie County?

To Hon. W. R. Lott, Clerk, Circuit Court, Ft. Pierce, Florida:

Section 43 (d), Chapter 19554, Acts of 1939, being the code of criminal procedure provides:

"(d) No sheriff, deputy sheriff, constable, deputy constable, highway patrolman or other person employed or paid by the state or any county thereof, as a law enforcement officer, shall be entitled to witness

CRIMINAL PROCEDURE—Preliminary Examination

fees or to mileage when summoned to testify in any court sitting in the county in which he holds office, is employed or has his residence."

The answer to your question is the construction to be placed upon the clause, "or other person employed or paid by the State or any county thereof, as a law enforcement officer." I do not believe that this clause was intended nor does it qualify or refer to the preceding named officers, but does apply and was intended to add to the classification of persons that are not entitled to witness fees or to mileage.

You state in your letter that the deputy sheriff is not employed by the County. Even though that be true, nevertheless, the deputy sheriff is as much *paid* by the State as is the sheriff.

Fees collected by the sheriff represent the charges made by the State for services rendered by it through him and constitutes a fund subject to the control of the State to be applied as the Legislature directs. The sheriffs' offices in this state operate on a fee basis with a maximum salary, and all fees collected by the sheriff over and above his maximum salary and the expenses of his office, constitute a trust fund over which the sheriff is the trustee until such time as he shall pay the same over to the proper authorities. A sheriff has the right to employ a deputy or deputies to assist him in the discharge of his official duties and the salary or compensation of a deputy is a proper expense of operating the sheriff's office. It is obvious, therefore, that it is the State's money that pays your sheriff and his deputies. Neither, strictly speaking, are employed by the State or county thereof, but both are paid by the State.

It is my opinion that a deputy sheriff appointed by the sheriff of your county is not entitled to witness fees or to mileage when summoned to testify in the local courts of your county.

BAIL

December 9, 1942.—042-551.

BAIL BOND—COST FOR APPROVING

QUESTION: Is a sheriff authorized to charge a statutory fee for writing, taking, and approving a bail bond when under the provisions of Section 903.16, Florida Statutes, 1941, the defendant tenders with the executed bond a sum of money equal to the principal thereof?

*To Hon. Berlin A. Sawyer, Sheriff, Monroe County,
Key West, Florida:*

In my opinion you are entitled to the statutory fee for writing, taking and approving such bond.

BAIL

September 16, 1941.—041-533.

BAIL BOND—ENFORCEMENT OF FORFEITURE

QUESTION: Should the State Attorney, the County Solicitor or the County Attorney represent the State in the Circuit Court in proceedings to enforce the forfeiture of a criminal bail bond?

To Hon. J. Rex Farrior, State Attorney:

Article V, Section 15, of the Constitution of Florida, provides "the Governor, by and with the consent of the Senate, shall appoint a State

CRIMINAL PROCEDURE—Bail

Attorney in each Judicial Circuit whose duties shall be prescribed by law and who shall hold office for four years . . ."

Section 4739, Compiled General Laws of Florida, 1927, prescribes in part the duties of the State Attorney as follows: "It shall be his duty to appear in the Circuit Court within his Judicial Circuit and prosecute or defend, on behalf of the State, all suits, applications or motions, civil or criminal, in which the State is a part."

The Criminal Procedure Act uses the term "Prosecuting Attorney" interchangeably as meaning the officer charged with the duty of prosecuting any given criminal offense. In some instances the term would necessarily mean the State Attorney; in others the County Solicitor. For example, Section 134 of the Act requires that the defendant be arraigned by having the charge stated to him by the Prosecuting Attorney; in a capital case this would mean the State Attorney, and in any other criminal case the term would refer to the County Solicitor (in a county having a Criminal Court of Record). However, the criminal procedure act does not expressly, nor by necessary implication, repeal or modify Section 4739 C.G.L. 1927. I believe both of these statutes should be considered together, and if there is no direct conflict between them, they should both be given effect.

Section 4739, Compiled General Laws, 1927, was enacted for the purpose of prescribing the duties of the State Attorneys in accordance with the mandate of the Constitution (Article V, Section 15), and its provisions should not be nullified unless it clearly appears that such was the intent of the Legislature.

I do not find any irreconcilable conflict between Section 4739 C.G.L. and Section 71 of the Criminal Procedure Act.

It is my opinion that the "Prosecuting Attorney" referred to in Section 71 means the officer charged with the duty of prosecuting the particular case in which the bail bond is given, and it is his duty, upon such bail bond being forfeited, to perform the ministerial act of filing a certified copy of the Order of Forfeiture in the office of the Clerk of the Circuit Court. The Circuit Judge is thereupon required to enter judgment against the person bound by the undertaking.

It is further my opinion, that in the event of any further proceeding on this judgment in the Circuit Court, it is the duty of the State Attorney, under Section 4739 C.G.L., to represent the State in such proceeding, except in those counties where the boards of county commissioners have, pursuant to the provisions of special or local laws, contracted with private attorneys for the collection of criminal bail bond.

BAIL

May 20, 1941.—041-276.

BAIL BOND—FORFEITURE

QUESTION: (1) How should title be taken where State Attorney is high bidder at Sheriff's sale of land upon which levy has been made to satisfy a judgment on an estreated bail bond?

(2) Out of what fund should the cost of proceedings be paid?

(3) Into what fund should the proceeds of any sale of the land so acquired be paid?

CRIMINAL PROCEDURE—Bail

To Hon. Clyde H. Wilson, State Attorney, Sarasota, Florida:

It is stated in Section 1776, Revised General Statutes, (Section 2827, C.G.L.): "Proceeds of all forfeited bail bonds or recognizances shall be paid into the fine and forfeiture fund of the county in which the indictment was found or the prosecution commenced, and judgment must be entered therefor in favor of the State for the use of the particular county."

The cases which have been decided upon this Section and Sections 6050-6056, R.G.S. (Sec. 8351-8357 C.G.L.) governing the estreatment of bail bonds clearly hold that a judgment in the name of the "State of Florida" is invalid and that such judgment must be in the name of the "State of Florida for the use and benefit of.....County." The land upon which the levy is made takes the place of the judgment insofar as it satisfies a part or all of such judgment and therefore the title to the land should be taken in the same manner as the judgment is required to be taken. In this case, therefore, title to the land should be taken in the name of the "State of Florida for the use and benefit of Sarasota County."

Section 1776 R.G.S. also requires that the proceeds of all forfeited bail bonds shall be paid into the fine and forfeiture fund of the county. The cost of obtaining the judgment and of acquiring title to the land are proper criminal expenses in the proceeding for the collection of the amount of the bond and should be paid out of the fine and forfeiture fund of the county. When any sale is made of the land acquired in lieu of the bail bond the proceeds should be paid into such fine and forfeiture fund.

BAIL

May 12, 1942.—042-238.

BAIL BOND—PROCEDURE IN ESTREATING

QUESTION: What is the proper procedure to be followed in estreating cash bail bonds and in paying the proceeds thereof into the fine and forfeiture fund of the county?

To Hon. Bryan Willis, State Auditor:

There is no longer any statutory provision expressly setting out the procedure to be followed in estreating cash bail bonds and in paying the proceeds thereof into the fine and forfeiture fund of the county, where it is required to be paid by Section 9 of Article XVI of the Florida Constitution. The former provision found in Section 8334 (6037) Compiled General Laws, 1927, was repealed by Section 319, Chapter 19,554 Acts of 1939.

Forfeited bonds in criminal proceedings must be paid into the county fine and forfeiture fund (Article XVI, Section 9, Florida Constitution; Section 2827 C.G.L.). When a cash bond is forfeited it is usually treated as if it were money recovered in a suit on a recognizance (6 C. J. 1024, Section 278). Where a breach of an undertaking occurs, the court having jurisdiction of the crime should declare the undertaking, "and any money or bonds that have been deposited as bail", forfeited (Section 69, Chapter 19554, Acts 1939). No further proceeding upon a cash bond seems to be provided in the Criminal Procedure Act of Florida. From these authorities it seems that when the cash bond is declared forfeited under Section 69, Chapter 19554, Acts of 1939, that the money should be immediately paid into the county fine and forfeiture fund.

CRIMINAL PROCEDURE—Bail

The proper procedure to be followed in estreating cash bail bonds and in paying the proceeds thereof into the fine and forfeiture fund of the county, is as follows:

(a) When a cash bond is received the officer taking it should require a written undertaking from the defendant, and from the person putting up the cash bond if other than the defendant, setting forth the terms and conditions of the cash deposit;

(b) When the terms and conditions of this undertaking are breached, by the failure of the defendant to appear or otherwise as the case may be, the court, before whom the cause is pending, should enter a judgment of forfeiture, declaring that the undertaking of the defendant and the money deposited as bail is forfeited because of such breach;

(c) If this forfeiture is not discharged within ten days from and after the entry of the order of forfeiture, as provided by Section 70 of the Criminal Procedure Act, the money deposited as aforesaid should be paid into the fine and forfeiture fund of the county;

(d) The proceeding set out in Section 71 of the Criminal Procedure Act, to be had in the Circuit Court does not seem to be required in cases where cash bonds are posted.

INDICTMENT AND INFORMATION

October 19, 1942.—042-494.

CAPIAS—COMMITMENT WITHOUT ISSUANCE

QUESTION: Is a commitment without the issuance of a warrant or a capias sufficient authority upon which the Sheriff could lawfully detain the prisoner committed to his custody?

To Hon. M. A. Rosin, Prosecuting Attorney, Arcadia, Florida:

Your attention is directed to the provisions of Section 907.01, Florida Statutes 1941, wherein it is provided:

"Upon the filing of an indictment or information, if the person named therein is not in custody, or at large on bail for the offense charged, the judge shall direct the clerk to issue immediately or when so directed by the prosecuting attorney, a capias for the arrest of such person."

It is my opinion that where the defendant has been by a committing magistrate lawfully committed to the custody of the sheriff to await the investigation of the Grand Jury or prosecuting attorney, and thereafter an indictment or information is filed against him, the judge of the Court having trial jurisdiction is not by law required to direct the issuance of a capias for the arrest of the defendant. In such cases the commitment delivered to the Sheriff is his authority for detaining in custody the defendant, until such time as he has been acquitted or convicted of the charge contained in the indictment or information.

INDICTMENT AND INFORMATION

February 10, 1941.—041-73.

CAPIAS—ISSUANCE WHEN DEFENDANT NOT IN CUSTODY

QUESTION: Should a capias be issued when the defendant is not in custody but is under bond to appear at the next term of court?

CRIMINAL PROCEDURE—Indictment and Information

To Hon. M. A. Rosin, Prosecuting Attorney, Arcadia, Florida:

The question submitted is covered apparently by Section 130 of the Criminal Code, Chapter 19554, Acts of 1939. This statute seems to settle this question by providing that the Judge, before whom indictment or information is filed, should direct the Clerk to issue a *capias*, if the person named in the information is not in custody or is at large on bail for the offense charged.

Previous to the adoption of the Criminal Code, the statute (Section 8375, Compiled General Laws) provided for the issuance of a *capias* if the defendant "be not already in custody" and did not mention the issue as to whether the defendant is at large on bail.

The case of *Ex parte Cribbs*, 109 Fla. 286; 146 So. 912, was decided while Section 8375 was in force and effect.

Supplemental Opinion February 17, 1941.—041-73.

Under Section 130 of the Criminal Code (Chapter 19554, Acts of 1939), upon the filing of an indictment or information, if the person named therein is not in custody or is not at large on bail for the offense charged, a *capias* should be issued for his arrest. If he is in custody or if he is at large on bail, no *capias* is necessary.

Previous to the adoption of the Criminal Code, the Statute (Section 8375, Compiled General Laws) provided for the issuance of a *capias* if the defendant "be not already in custody" and did not mention the subject where the defendant is still at large on bail. While that statute was in effect, the Florida Supreme Court held in the case of *Ex Parte Cribbs*, 109 Fla. 286, 146 So. 912, that a judge had power to order a *capias* to issue for the arrest of the accused on the indictment or information brought, "notwithstanding the fact that the accused is already at large upon bail allowed by the committing magistrate, which bail would be otherwise legal and sufficient to secure the appearance of the accused if no *capias* were ordered." The Court in that case indicated that the ordering of a *capias* under those circumstances was in the discretion of the judge.

The Criminal Code above referred to has been enacted and the decision just quoted from clearly settles the problem by providing that the judge should direct the clerk to issue a *capias*, if the person named in the information is not in custody or is not at large on bail for the offense charged.

If the person named in the information is in custody or is at large on bail for the offense charged, no *capias* need be issued, but I still think the judge has the power to direct the issuance of same, just as was ruled in the *Cribbs* case.

CONDUCT OF TRIAL

March 10, 1942.—042-143.

CONFESSIONS—EXTRA-JUDICIAL

QUESTION: For a confession of guilt to be admissible in evidence is it necessary that the defendant had been previously warned and fully advised of his rights under the law? This question involves the case of *Harrison vs. State*, 5 So. 2d 703.

CRIMINAL PROCEDURE—Conduct of Trial

To Hon. Chester B. McMullen, State Attorney, Clearwater, Florida:

An examination of the record in the Harrison case discloses that the defendant was fully advised of his rights before he made the confession, and that the Court did not pass upon any question involving extra-judicial confessions made without warning.

The three points on which the Harrison opinion appears to be grounded are: (1) whether the confession was freely and voluntarily made, (2) the great caution that should be used by a jury in considering a confession, and (3) sufficiency of the instructions of the Court "upon the law of the case" relative to confessions.

In the recent case of Stoutamire vs. State, 133 Fla. 757, 183 So. 316, our Supreme Court discussed at some length the question of extra-judicial confessions and the necessity for advising defendant of his rights before the same are made, and approved the rule long established that— an extra-judicial confession is not rendered inadmissible merely because the accused was not so advised. I do not know of any case which has reversed the Stoutamire decision.

It is, therefore, my opinion that the rule stated in Stoutamire vs. State, supra, remains the law and that such mentioned quotation appearing in Harrison vs. State, does not in any way change the law governing the admissibility of extra-judicial confessions.

While there is no legal requirement that the accused be advised of his rights before making an extra-judicial confession, in view of Section 12 of the Declaration of Rights of the Florida Constitution which provides that: "No person shall be . . . compelled in any criminal case to be a witness against himself . . ." and the provisions of Section 214 of the Florida Criminal Code to the same effect, it is my further opinion that where an effort is made to obtain a voluntary confession, the officer should first advise the prisoner of his constitutional and statutory rights. If then the accused makes an extra-judicial confession, freely and voluntarily, it follows that he has not been compelled to be a witness against himself; and testimony of an officer that the confession was made after the accused was so advised is very strong evidence to support the admissibility of the confession as one that was freely and voluntarily given.

JUDGMENT AND SENTENCE

October 8, 1942.—042-481.

FINE AND COST BOND—EXECUTED BY MEN NOW IN MILITARY SERVICE—PROCEDURE UPON DEFAULT

QUESTION: The sheriff of Okaloosa County has on hand several fine and cost bonds executed by men who are now in the United States Army. Some of these parties entered the Army before and some after the ninety-day period provided for payment of such bond expired. Should the sheriff proceed against the bondsmen in view of the provisions of the Soldiers and Sailors Civil Relief Act of 1940?

To Hon. H. Isle Enzor, Sheriff, Okaloosa County, Crestview, Florida:

It is, by Section 921.15 (2), Florida Statutes, 1941, provided that if a fine and cost bond is not paid at the expiration of the ninety-day period provided therein:

" . . . the sheriff or other officer aforesaid shall indorse on the bond that default has been made in the payment, and having signed such indorsement, shall file the bond with the clerk of the court in which

CRIMINAL PROCEDURE—Judgment and Sentence

judgment was rendered, and the clerk shall forthwith issue execution for the amount of the fine and costs against the security or bail, as if there had been judgment at law on such bond, and the same proceedings shall be had as in cases of other executions, and the person convicted shall be liable to be proceeded against, as if no such bond had been given, until the same has been fully paid and satisfied."

The pertinent provision of the Soldiers and Sailors Civil Relief Act of 1940 to which you refer, is found in U.S.C.A., Title 50, Section 513 (1):

"Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended, such stay, postponement, or suspension may, *in the discretion of the court*, likewise be granted to sureties, guarantors, endorsers, and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended." (Italics ours.)

It will, therefore, be observed that under the provisions of the applicable Florida Statutes, when a fine and cost bond is due and unpaid, it then becomes your duty to endorse on the bond that the same is in default in payment, and having signed such endorsement, file the bond with the clerk of the court in which judgment was rendered. I am not called upon to rule upon the procedure to be followed by the clerk in such matters.

JUDGMENT AND SENTENCE

February 12, 1941.—041-65.

JUDGMENT FOR COSTS ON CONVICTION

QUESTION: Is the County Judge compelled, in pronouncing the sentence to be imposed, to separate the amount of the fine from the costs?

To Hon. Orvil L. Dayton, Jr., County Judge of Pasco County, Dade City, Florida:

The only statute which deals with the payment of costs by the convicted party when a fine is to be the punishment imposed is Section 8475, Compiled General Laws of Florida, 1927, providing that:

"In all cases of conviction for crime the costs of prosecution shall be included and entered up in the judgment against the convicted person."

In all those cases where the aggregate amount of the fine and the costs is equal or less than the maximum amount of fine allowed by law to be imposed for the offense of which accused is guilty the form "that you pay a fine and costs of dollars or that you be confined, etc." is permissible. However, in those in which the fine and costs in the aggregate exceed the maximum amount of the fine allowed by statute, the form "that you pay a fine of dollars and costs or that you be confined, etc.," must be used. For example, where the statute imposes a maximum fine of one hundred dollars in the particular offense for which accused is being tried and the County Judge wishes to fine only fifty dollars he may include his costs in the fine. If, however, the fine is to be one hundred dollars, the fine and the costs must be stated separately, as the maximum amount allowed by statute being imposed as a fine for punishment of that particular offense is one hundred dollars.

There is no mandatory provision under which the County Judge is compelled, in pronouncing the sentence to be imposed, to separate the

CRIMINAL PROCEDURE—Judgment and Sentence

amount of the fine from the costs, except in those instances where the aggregate amount of the fine and the costs exceeds the jurisdiction of the court to impose a fine for that particular offense.

JUDGMENT AND SENTENCE

August 9, 1941.—041-443.

SENTENCES—CONSECUTIVE AND CONCURRENT

QUESTION: How should a subsequent sentence be treated when it is imposed on a prisoner while out on either temporary or conditional parole, the subsequent sentence, being the basis for revocation of parole, and automatically placing original sentence in effect?

To Hon. Nathan Mayo, Commissioner of Agriculture, Prison Division:

Section 261, Criminal Procedure Act, provides:

"When the defendant has been convicted of two or more offenses charged in the same indictment or information or in consolidated indictments or informations, the terms of imprisonment shall be served concurrently unless the Court expressly directs that they or some of them be served consecutively. Sentences or imprisonment for offenses not charged in the same indictment or information shall be served consecutively unless the court expressly directs that they or some of them be served concurrently."

It is my opinion that, unless the trial court expressly provides to the contrary, the subsequent sentence, not being based upon the same indictment or information as the original sentence, must be served after the prisoner has completed the service of his original sentence.

APPEALS

May 26, 1941.—041-288.

FINE AND COST BOND—EFFECT

QUESTION: May a defendant, after making a 90-day bond to pay fine and costs, a week later appeal from the sentence and obtain a supersedeas bond?

To Hon. L. E. Scaffe, Justice of Peace, Sixth District, Volusia County, De Leon Springs, Florida:

Under Section 260-a of the Criminal Procedure Act of 1939 (Chapter 19554) a defendant has the right to give a bail bond for fine and costs wherever the sentence is to pay a fine only and does not include imprisonment. This section has no effect upon the right of any defendant to appeal from his sentence under Section 281 or to give the supersedeas bond required under Section 293-A. The time within which a defendant may enter his notice of appeal is stated by Section 288 as 90 days from the date of the entry of judgment from which the appeal is to be taken.

It is therefore my opinion that wherever a defendant duly enters his notice of appeal within the time stated and obtains the supersedeas bond, that such bond supersedes any action that may be taken upon failure to comply with the bond to pay fine and costs.

CRIMINAL PROCEDURE—Inquests of the Dead
INQUESTS OF THE DEAD

November 18, 1942.—042-532.

CORONERS—FEES AND DUTIES

QUESTION: (1) When are coroners required to investigate and hold inquests of the dead in this state?

(2) What fees are said coroners entitled to for making such investigations and holding such inquests of the dead?

(3) What authority has the board of county commissioners to investigate and determine the necessity for holding inquests of the dead, in auditing and paying claims presented by coroners?

To Hon. Bryan Willis, State Auditor:

As soon as the coroner, whether he be a justice of the peace or the county judge, is notified that the body of any person supposed to have come to his death by violence or criminal negligence, has been found lying in his district, it immediately becomes his duty to go to the scene where the body lies and view it. This is the first official step in the performance of the duties of a coroner. He must next determine whether or not there is good reason to believe that the death was caused by the criminal act or negligence of another, which decision determines whether further proceedings shall be had. If he decides from his consideration of the circumstances attending the cause of death that there is good reason to believe that death was caused by the criminal act or negligence of another he shall proceed to summons a jury and hold an inquest, otherwise no inquest should be held. (See *State vs. Cary*, 143 Fla. 130, 196 So. 694 and sections 936.01, 936.02 and 936.03 Florida Statutes, 1941). The statutes seem to require the coroner to make an investigation whenever he is notified that "the dead body of any person supposed to have come to his death by violence or negligence of another" has been found lying in his district. The question as to whether or not an inquest should be held seems to be one of discretion for the coroner, and it should be presumed that he exercised this discretion in good faith.

From what has been pointed out it seems that:

(1) Coroners, whether a justice of the peace or the county judge, are required to make investigations and determine whether inquests are necessary, when notified that the body of any person supposed to have come to his death by violence or negligence of another has been found lying within his district, and if an inquest is determined to be necessary the coroner should hold the same as soon as reasonably possible.

(2) If no inquest is found to be necessary a fee of \$3.00 and mileage only is allowed; if an inquest is necessary, the fees set out in section 936.18, Florida Statutes, 1941, are allowed.

(3) Section 936.18, Florida Statutes, 1941, requires a coroner to certify to the correctness of his payrolls for inquests and deposit them with the clerk of the circuit court of the county in which the inquest shall be held, and further requires that "the clerk shall submit them to the board of county commissioners for their approval or disapproval." Section 142.11, Florida Statutes, 1941, provides that county commissioners may reject all or any portion of any account which is not a valid claim against the county. In my opinion these two statutes give the board of county commissioners a supervisory control over cost bills for coroners' inquests, in the exercise of which a court of competent jurisdiction would be the final arbiter.

CRIMINAL PROCEDURE—Inquests of the Dead

If a justice of the peace elected to hold a coroner's inquest in cases unauthorized by the statutes, the county commissioners, under these two provisions of our statutory law, undoubtedly would have the power and authority, and it would be their duty to disapprove cost bills therefor. This reference is for illustrative purposes.

INQUESTS OF THE DEAD

August 26, 1942.—042-433.

COUNTY JUDGE—AUTHORITY

QUESTION: Has a County Judge authority to hold inquests when the Justice of the Peace is available and not disqualified?

To Hon. Spessard L. Holland, Governor:

Section 936.01 Florida Statutes 1941 reads as follows:

"JUSTICES OF THE PEACE TO HOLD INQUESTS.—Justices of the Peace, within their respective districts, shall hold inquests of the dead, and to that extent shall be deemed coroners. In case the justice of the district in which the death occurs shall be for any reason unable to hold an inquest, it shall be held by the County judge or by a justice of one of the adjoining districts of the county."

I construe this statute to mean that justices of the peace, within their respective districts, are vested with exclusive jurisdiction in such matters and that county judges and justices of the peace of adjoining districts may exercise jurisdiction only when the justice of the peace of the district involved "shall be for any reason unable to hold an inquest."

The language last quoted is rather broad but, to my mind, clearly conveys the idea that in order for the county judge, in the first instance, or the justice of the peace of an adjoining district in the second, to have authority to hold an inquest, the resident justice of the peace must be disqualified, or unable for some legal reason to perform the functions of coroner.

As is generally known, county judges usually hold inquests in our rural counties, probably because that official is almost always readily available for the prompt action ordinarily required and necessary in such matters, and justices of the peace are not active or as readily available.

Answering the direct question which you propound, however, it is my opinion that county judges do have authority to hold inquests under the circumstances named in the statute, i. e., when the appropriate justice of the peace is unable for any legal reason to do so, and that the question as to whether any legal reason exists depends upon the circumstances of the given case.

INQUESTS OF THE DEAD

November 28, 1942.—042-538.

MILITARY PERSONNEL—REMOVAL FROM SCENE OF ACCIDENT

QUESTION: May coroners, or any other state or county officers grant a general authority to the army and navy, or either of them, for the removal of military personnel, either injured or killed, from the scene of the accident?

CRIMINAL PROCEDURE—Inquests of the Dead

To Hon. Vassar B. Carlton, County Judge, Titusville, Florida:

In so far as the above question relates to injured army or navy personnel you are advised that no authorization for removal is necessary, because coroners have no jurisdiction or authority over persons who have received injuries until they have died from those injuries. Such persons may be removed while they are alive without official authorization from the coroner or from any other state or county official.

Justices of the peace within their respective districts are authorized to hold inquests of the dead and to that extent are deemed coroners. County judges and justices of the peace of other districts are authorized to act as coroners only when the resident justice of the peace, if there be one, "shall be for any reason unable to hold an inquest". In districts where there is no resident justice of the peace the county judge or any other justice of the peace of the county may act. Unless there is good reason to believe that death was caused by the criminal act or negligence of another no inquest is necessary. The coroner is by statute required to make an investigation, when the dead body of a person has been found lying in his district, only in case there is reason to believe that such person came to his death by violence or criminal negligence of another (sections 936.01-936.03, Florida Statutes, 1941). The term "violence" as used in section 936.03, supra, means the unlawful use of physical force or other agency to cause death, and does not include mere accident or casualty (13 C.J. 1246, note 15 (a) et seq.). The mere fact that a body lies dead does not give the coroner jurisdiction, even though death was sudden, there ought to be a reasonable suspicion that it was caused by some violence, criminal act or negligence of another (13 Am. Jur. 108-9, section 6 and Florida Statutes above mentioned).

Under Article 113 of the articles of war and articles 55 through 60 of the articles for the government of the navy, the army and navy are authorized and empowered to hold inquests when their personnel is found lying dead within places under their jurisdiction and where the state has transferred exclusive jurisdiction over such places to the United States the jurisdiction of the State seems doubtful. Where the body is found dead on lands under the exclusive jurisdiction of the state the military jurisdiction would not attach.

I am, therefore, of the opinion that by joint grant the *county judge and all the justices of the peace* within the county may grant a general authority to the army and navy, or either of them, authorizing them to remove military personnel killed in accidents within the county (no authority for removal of injured personnel being necessary) in cases where there is no evidence sufficient to cause a reasonable person to believe that the death was caused by some unlawful violence, criminal act or negligence of another, or when killed on lands under the exclusive jurisdiction of the army or navy. Any such grant of authority should provide that where there is good reason to believe that death was caused by some unlawful violence, criminal act or negligence of another that the coroner be immediately notified and that the body remain where it is found until viewed by the coroner and special permission for its removal is granted.

COSTS AND FEES

December 9, 1942.—042-558.

CAPITAL CASES—COMPENSATION OF COUNSEL

QUESTION: (1) Is an attorney appointed by the court to defend three insolvent defendants, each charged with a capital offense,

CRIMINAL PROCEDURE—Costs and Fees

entitled to compensation for his services not to exceed \$100 for each defendant?

(2) When a trial of such defendants results in a mistrial, is the attorney entitled to an additional fee for representing the defendants at a subsequent trial of the same cause?

To Hon. G. Warren Sanchez, Attorney at Law, Live Oak, Florida:

The provisions of Section 909.21, Florida Statutes, 1941, read as follows:

"In all capital cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant as he shall deem necessary, and shall allow such compensation as he may deem reasonable, such sum to be paid by the county in which the crime was committed. Counsel, so appointed, may in the event of conviction and sentence of death, appeal the case to the supreme court, and prosecute said appeal to its final conclusion with diligence; and until the supreme court has disposed of the appeal, no compensation shall be allowed to such counsel. If counsel first appointed is unable, for any reason, to perfect and prosecute the appeal, the court may relieve him from such duty, but shall appoint other counsel for such purpose. When counsel so appointed by the court, in capital cases, completes the duties imposed by this section, such counsel shall file a written report as to the duties performed by him, and apply for discharge by the court.

"The compensation of counsel for the defendant, at the trial shall not exceed one hundred dollars; and defendant's counsel's compensation on appeal, shall not exceed one hundred dollars additional."

It is my opinion that counsel appointed by the court to represent one or more insolvent defendants charged with a capital offense, is entitled to receive for representing each defendant such compensation not in excess of \$100 as the judge may deem reasonable. For such compensation it is the duty of counsel to represent each defendant until the case has been finally disposed of in the trial court.

COSTS AND FEES

March 21, 1941.—041-153.

COURT COSTS—COUNTY JUDGE'S COURT—PREPAYMENT

QUESTION: Must a good citizen, coming into the county judge's court with a worthless check or for someone defrauding him out of board and lodging, put up a bond to cover court costs?

To Hon. J. E. Pridgeon, County Judge, Gulf County, Wewahitchka, Florida:

Section 8490, Compiled General Laws of 1927, provides:

"Prepayment must be required.—In all cases justices of the peace and county judges in this State shall require payment in advance or security for costs of process, service of the same, and of examination, unless the party applying for a warrant shall make an affidavit of insolvency and of substantial injury, to person or property, by him suffered, in which case process shall issue without payment of costs."

In a number of cases the Florida Supreme Court has held that this section has no applicability to crimes of a public nature such as the violation of a local option law or felonies. The crimes of uttering checks with intent to defraud, and of obtaining lodging with intent

CRIMINAL PROCEDURE—Costs and Fees

to defraud, are misdemeanors, and not in my opinion crimes of a public nature. Therefore, in such cases it is incumbent upon you to comply with Section 8490 above quoted.

COSTS AND FEES

April 24, 1941.—041-228.

CRIMINAL REPORTS—FEES FOR PREPARATION

QUESTION: What is the proper charge for making and filing a criminal report required by Section 277 of the Criminal Procedure Act of 1939 (Chapter 19554, Laws of Florida, Acts of 1939)?

To Hon. Gordon Higel, Justice of the Peace, 1st District, Sarasota, Florida:

Section 3384, Revised General Statutes, (Section 5237, Compiled General Laws) provides that:

"The fees of the Justice of the Peace shall be the same as those for the Clerk of the Circuit Court for similar services."

The Florida Supreme Court held in *State vs. Harlee*, 100 Fla. 1562, 131 So. 866, that this section referred only to the fees of the Clerk of the Circuit Court prescribed by Section 3084, Revised General Statutes and not to fees of such Clerk prescribed by subsequent statutes. Therefore, for the preparation of the Criminal Report about which you have inquired, you are entitled to 20 cents for the first 100 words and 10 cents for each additional 100 words or fraction thereof.

The law requires only that one copy be prepared for the prosecuting attorney of the trial court having jurisdiction so that it is not necessary for you to retain any copy and you are not entitled to any fee for filing such a copy.

COSTS AND FEES

February 24, 1941.—041-84.

WITNESSES—BEFORE GRAND JURY—FEES

QUESTION: Are persons entitled to additional fees when appearing as expert witnesses before an inquisitorial body as a witness?

To Hon. Hal W. Adams, Judge, Mayo, Florida:

Section 1 of Chapter 18412, Acts of 1937, is the first and only act under which witness fees, other than those ordinarily paid, are authorized. That section seems to contemplate that expert witness fees are payable only to witnesses in the actual trial, or in cases about to be tried, as distinguished from appearance before an inquisitorial body such as a Grand Jury.

UNIFORM INTERSTATE EXTRADITION

September 30, 1942.—042-468.

PERSONS UNDER CRIMINAL PROSECUTION—GOVERNOR'S DISCRETION

QUESTION: May the Governor of Florida honor requisition of executive authority of sister state for extradition of one under criminal prosecution in this state at the time of such requisition?

CRIMINAL PROCEDURE—Uniform Interstate Extradition

To Hon. Spessard L. Holland, Governor:

S. J. Scarborough, a fugitive from justice from Georgia, is now in custody of Sheriff J. H. Parker of Taylor County, Florida.

I have been advised by the Sheriff of Hillsborough County, Florida, that S. J. Scarborough is wanted in Hillsborough County for trial upon a charge of armed robbery committed August 30, 1941. It is my opinion that the Sheriff of Taylor County, Florida, should deliver this person to the Sheriff of Hillsborough County, so that his prosecution under the laws of the State of Florida may proceed.

Section 941.19, Florida Statutes, 1941, provides:

"Persons under criminal prosecution in this state at time of requisition.—If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state."

Should the Governor of Georgia make proper requisition and demand upon you for the extradition of Scarborough, the question of whether such demand should be granted is a matter which rests within your discretion.

CHAPTER XXXV

CORRECTIONAL SYSTEM

PAROLE

August 28, 1942.—042-427.

CIVIL RIGHTS—LOSS AND RESTORATION IN CONVICTED FELONIES

QUESTION: (1) May a person convicted of a felony in a state other than Florida enjoy all civil rights within this state?

(2) If an individual convicted of a felony in another state is deprived of civil rights within this state can these rights be restored by the Florida Board of Pardons?

(3) Is a person who has been found guilty of a felony in this State and placed on probation with the suspension of imposition of sentence deprived of his civil rights in this state?

(4) Is an individual who has been found guilty of a felony in another state and placed on probation on a suspended sentence deprived by law of his civil rights when he comes to this state?

*To Hon. Francis R. Bridges, Jr., Chairman,
Florida Parole Commission:*

(1) The prevailing rule is that in the absence of an express statute in a given state making the conviction of a criminal offense in any state operative to deprive the convicted person of his civil rights in the given state, any such disability does not extend beyond the limits of the state in which the conviction takes place. *Queenan vs. Oklahoma*, 11 Okla. 261, 71 Pac. 218; *Logan vs. United States*, 144 U.S. 263. In the State of Florida persons who have been convicted of bribery, perjury, larceny, or of any infamous crime "in any court of this state, or any other state" are not entitled to vote. (Florida Statutes, 1941, §98.01). Under the above rule this express provision obviously disqualifies a person convicted of a felony in another state from voting in this state. No express provision relating to a conviction in another state appears in the statutes governing qualifications for office (Florida Statutes, 1941 §§112.01 and 114.01), or the qualifications of jurors (Florida Statutes, 1941, §§40.01 and 40.07). Since a person to hold public office in this state must be a qualified elector, his loss of voting privileges by virtue of an out-of-state conviction would exclude him from holding such office. It would not seem that the Legislature intended that one should serve on the jury who could not vote or hold office because of conviction of a crime in another state.

Therefore, this question should be answered in the negative.

(2) Among other powers the State Board of Pardons is constitutionally vested with the power to "remit fines and forfeitures" (Art. IV, Sec. 12, Florida Constitution). In my opinion this power is broad enough to permit the State Board of Pardons to restore civil rights enjoyed under the laws of this state, the forfeiture of such civil rights being under the laws of this state, although a consequence of the conviction of a criminal offense in another state.

CORRECTIONAL SYSTEM—Parole

Therefore, this question should be answered in the affirmative.

(3) The statutes depriving one of civil rights do so when one has been "convicted" of any of the offenses prescribed in those statutes. The word "convicted" in such a statute, where it relates to legal effects of such, rather than the description of a particular step in a criminal proceeding, is interpreted to include the judgment and sentence of the court as well as the verdict. Accordingly, if imposition of sentence be suspended and the defendant be placed on probation, the defendant, although found guilty, is not "convicted" and does not, therefore, lose his civil rights under the statutes mentioned above. *Page vs. State Board of Medical Examiners*, 141 Fla. 294, 193 So. 82 (1940); *Smith vs. State*, 75 Fla. 468, 78 So. 530 (1918).

In this state trial courts have power only to suspend the imposition of sentence, but do not have power to impose sentence and then suspend the execution of it. (Section 948.01 (3), Florida Statutes, 1941).

Accordingly, I must answer this question in the negative.

(4) As explained in my answer to the third question, a person so found guilty and placed on probation with a suspension of the *imposition of sentence* is not "convicted" and is not, therefore, deprived of his civil rights when he comes to this state. If, however, as is sometimes the case in the federal courts and in some states, the defendant is found guilty and sentenced by the court and then placed on probation with a suspension of the *execution of the sentence*, he would be "convicted" as that term has been defined by the Florida Supreme Court and he would, accordingly, lose his civil rights in accordance with the statutes of this state.

PAROLE

September 29, 1942.—042-470.

GAIN TIME—LOSS ON VIOLATION OF PAROLE

QUESTION: What are the powers of the Parole Commission under Chapter 20519, Acts of 1941, and more particularly §§10 and 15 thereof, relative to the taking away of "gain time" of prisoners who have been returned to prison because of violating the conditions of their parole?

To Hon. Francis R. Bridges, Jr., Chairman, Florida Parole Commission:

I find nothing in either the title or the provisions of said chapter indicating an intention by the Legislature to give the Parole Commission any authority over the time to be served by the prisoner. To the contrary, said chapter appears to limit the powers and scope of action by the Commission (§17,—§947.23, Florida Statutes, 1941), to make findings on charges of parole violations, the entry of orders rescinding parole and returning such person to prison; and (§18,—§947.24, Florida Statutes, 1941), recommendations to the Board of Pardons for a pardon or commutation of sentence in deserving cases. That part of §10 (§947.13, Florida Statutes, 1941), which provides, "The Commission shall also have the powers and perform the duties of supervising all persons placed on parole and of determining violations thereof and what action shall be taken with reference thereto . . ." extends only to violations of parole and whether or not a prisoner should be reincarcerated.

While §33 (§949.04, Florida Statutes, 1941), provides that said parole law shall be liberally construed that its objects may be achieved, such objects include only the granting of paroles and incident matters. The absence of a provision empowering the Parole Commission to take away

CORRECTIONAL SYSTEM—Parole

"gain time", in addition to its authority to recommend commutations and pardons, would seem to indicate that the Legislature did not intend to give it this power, or to amend or repeal other controlling statutes.

Your request necessarily calls for a construction of that part of §15 (§947.21, Florida Statutes, 1941), which provides, "A violation of the terms of parole may render the parolee liable to arrest and a return to prison to serve out the time for which he was sentenced" and that part of §17 (§947.23, *supra*), which provides, "... returning such person to prison to serve the sentence theretofore imposed upon him."

Supplementing the sentence entered by the court on conviction, §954.06, Florida Statutes, 1941, provides: "The Commissioner of Agriculture shall keep a record of the conduct of each prisoner. Commutation of time for good conduct shall be granted by the Board of Commissioners of State Institutions, . . . and the following deductions shall be made from the term of sentence when no charge of misconduct has been sustained against the prisoner, viz.: Five days per month off the first and second years of the sentence . . ."

The words "commutation of time for good conduct shall be granted" appear mandatory when consideration is given to the remaining provisions of the statute.

The general rule is that a statute in existence at the time a convict is sentenced which allows a credit or "gain time" on account of good behavior becomes an inherent part of the sentence and punishment, and are a part of such record as much as if they were written into the records of the court. (15 Am. Jur. 104, 50 C.J. 346, §45.)

The only existing statute which makes specific provision for taking away "gain time" of a prisoner is that part of §954.06, *supra*, which provides: "For each sustained charge of escape or attempted escape, mutinous conduct or other serious misconduct, all the commutation which shall have accrued to the prisoner up to that day shall be forfeited . . ." A forfeiture of "gain time" occurs by operation of law when a prisoner is guilty of serious misconduct. The general rule appears to be "that the revocation of a parole does not operate as a forfeiture of the good time earned before the granting of the parole" (46 C.J. 1211, §82); and "where the right to, or privilege of obtaining, good conduct allowances has fully accrued, it is not subject to withdrawal, modification or denial, except as clearly authorized by statute" (41 Am. Jur. 919, §45).

It is my opinion, therefore, the parole act not having specifically repealed §954.06, *supra*, the "gain time" statute, that the same must be considered in *pari materia* with §§947.21, *supra*, and 947.23, *supra*, and all construed with reference to each other; and that after the prisoner has been returned to actual custody, as authorized by said last two sections, the balance of the term to be served is controlled by §954.06, *supra*, both as to "gain time" and forfeiture.

The provisions of the parole act contemplate that during the period of parole the prisoner shall be considered, at least technically, under the control and within the custody of the prison authorities. A parolee should be considered as a trusty with extended liberties and privileges. Therefore, the commission of any act of serious misconduct by a parolee should be considered in the same light as if the act had been committed while in actual custody; and if it was of such serious nature as to cause a forfeiture of "gain time" by operation of law, while the prisoner was in custody, either behind prison walls or with extended liberties as a trusty, the act, if committed while on parole, would likewise cause a statutory forfeiture of "gain time".

CORRECTIONAL SYSTEM—Parole

On parole being revoked, the Parole Commission should make a full report of the cause thereof so that the prison authorities can determine whether or not a charge of serious misconduct is sustained which operated as a forfeiture of "gain time".

PAROLE

October 17, 1941.—041-584.

COMMISSION—APPOINTMENT OF SUPERVISORS

QUESTION: (1) Has the Parole Commission authority to appoint parole supervisors in Criminal Courts of Record under Section 32A, Chapter 20519, Acts of 1941?

(2) Is it the duty of the county in which certain courts are located to pay salary and expenses of parole supervisors assigned to such county?

To Florida Parole Commission:

(1) The Act requires the Parole Commission to appoint the parole supervisors in all Criminal Courts of Record or Courts of Crime heretofore created by special legislative acts if such courts do not come within the terms of Chapters 19245 and 19248, Laws of Florida 1939. The Parole Commission is charged with the duty of appointing such parole supervisors and determining their salaries. The appointment of such parole supervisors must be in accordance with the provisions of Section 6 of the Act which require selection to be on the basis of a free, competitive, examination. Inasmuch, however, as such parole supervisors will be paid by the county in which each will serve, the competitive examination for each of such positions should be restricted to the applicants from the particular county in which the parole supervisor will serve.

In my opinion, the parole supervisors appointed under Section 32A are subject to the direction of the Parole Commission in the same manner as those employees provided for in Section 5 of the Act and those designated in Section 32 of the Act.

(2) In my opinion, Section 32A of the Parole and Probation Act requires the county in which any parole supervisor is appointed in accordance with Section 32A of the Act to provide for and pay the salary and official expenses of such supervisor as determined by the Parole Commission.

It is my opinion, with reference to the supervisors appointed by you for these Criminal Courts of Record and Courts of Crime, that where you make such appointments in counties heretofore having probation officers, the salaries that you recommend to be paid by the county involved should be in an amount in line with salaries paid in the two counties subject to the provisions of Chapter 19245, Acts of 1939, which by reference thereto you will find to be as follows:

For the probation and parole officers, \$2,700.00 per annum.

As expenses for conduct and operation of the office, \$600.00 per annum.

For clerk or stenographer, \$100.00 per month.

There should also be such additional allowances for automobile or other incidental necessary expenses as the County Commissioners in the respective counties may find advisable and necessary to meet demands and conditions.

CORRECTIONAL SYSTEM—Parole**PAROLE**

October 22, 1941.—041-630.

COMMISSION—OBTAINING COURT RECORDS

QUESTION: Does Chapter 20519, Acts of 1941, contemplate that the various clerks of courts are bound to furnish information regarding persons who might become subject to parole; are they to be paid for their services, and, if so, in what manner?

To Florida Parole Commission:

Section 11 of the Act provides:

"... It shall be the duty of the court, and its prosecuting officials, to furnish to the Commission upon its request such information and also to furnish such copies of such minutes and other records as may be in their possession or under their control."

My opinion is that the Legislature, by this provision, has imposed a duty upon the courts and prosecuting officials to furnish the information designated in this section upon your request. The term "courts" as used in this provision refers to the judicial tribunal and includes not only the judge, or judges, but also the clerk who is the ministerial officer of the court having custody of its records.

Regarding the matter of compensation, it is my opinion that judges, prosecution officials, and clerks of courts are duty-bound under the above provision to furnish copies of records in their possession as a function of their office, without additional compensation.

PAROLE

November 22, 1941.—041-674

PRISONERS—ELIGIBILITY FOR PAROLE

QUESTION: Is a prisoner in a county jail who has been convicted on two counts of an information and sentenced to nine months on each, such sentences to run consecutively, subject to the paroling authority of the parole commission?

*To Hon. Francis R. Bridges, Jr., Chairman,
Florida Parole Commission:*

Section 12 of Chapter 20519, Laws of Florida, 1941, provides:

"Every person who has been, or who may hereafter be convicted of a felony and confined in a jail or prison in this State in execution of the judgment of the court thereof for a definite term of over one year and who has served not less than six months of such term and whose prison record is good, shall be eligible for consideration by the Commission for parole . . ."

It is obvious that only prisoners who have been convicted of a felony, have been confined in a jail or prison, and have served not less than six months of their sentence are eligible for parole. Moreover, only prisoners who are so confined in execution of the judgment of a court of this state for a definite term of over one year may be considered for parole.

Your question involves whether a person receiving a sentence on each of two counts of an information, each sentence being for less than

CORRECTIONAL SYSTEM—Parole

one year, but totaling over one year and to run consecutively, can be considered as being confined in execution of a judgment for a *definite term of over one year*, and is, therefore, eligible to parole under the above provision.

The total time for which a prisoner is sentenced under several counts of an information or indictment, if the sentences are to run consecutively, should be considered as one definite term under the above provision. *Thompson vs. U. S.*, 204 Fed. 973, (C. C. A. 9th, 1913); *U. S. vs. Greenhaus*, 85 Fed. 2d 116, (C. C. A. 2d, 1936).

This interpretation is the only one consistent with the purpose and objectives of the Parole and Probation Act. The legislature could not have contemplated, for instance, that a prisoner sentenced under one count of an information for eighteen months would become subject to parole, whereas a prisoner sentenced for one year under each of three counts of an indictment, the sentence to run consecutively, (a total of three years) would not become subject to the rehabilitative effects of the parole system.

In the case you state, if the prisoner has been convicted of a felony, sentenced in consecutive sentences for a total of more than one year, and served six months, and his record of conduct in jail is good, he is subject to the parole granting authority of the parole commission.

PAROLE

May 26, 1942.—042-257.

PRISONERS AND PAROLEES—CITIZENSHIP

QUESTION: (1) Is a prisoner convicted of a felony and sentenced to prison for a term exceeding one year an American citizen if he or she had such status at the time of trial?

(2) Do parolees have the status of being citizens of this country if they were such at the time of entering prison?

To Hon. Francis R. Bridges, Jr., Chairman,
Florida Parole Commission:

(1) This question must be answered in the affirmative. While the statutes of the State of Florida divest a person upon conviction of a felony of certain civil rights, such as voting, holding office, and serving on a jury, the conviction does not in any way deprive such person of his status either as a citizen of the United States or as a citizen of the State of Florida. One's citizenship is a status guaranteed him by the Fourteenth Amendment to the Constitution of the United States, and this status is not lost through conviction for a felony.

There is some popular confusion regarding this matter due, no doubt, to the loose use of certain terms. "Loss of citizenship" is frequently spoken of in connection with the conviction of a felony, but what is actually meant is "loss of civil rights" or "loss of certain rights incidental to citizenship". I wish to emphasize, therefore, that the conviction of a felony in this state, while affecting certain rights arising out of citizenship, does not in any way alter one's citizenship.

(2) This question must also be answered in the affirmative for the reasons given in my answer to your first question.

CORRECTIONAL SYSTEM—Parole

PAROLE

December 19, 1941.—041-684.

PROBATION—ELIGIBILITY

QUESTION: May a person charged with an offense for which the maximum penalty prescribed by law is life imprisonment, but for which the court may fix a lesser penalty, be placed on probation under Section 20, Chapter 20519, Acts of 1941?

*To Hon. Francis R. Bridges, Jr., Chairman,
Florida Parole Commission:*

Section 20 of Chapter 20519, Acts of 1941, provides:

"The Courts of the State of Florida having original jurisdiction of criminal actions, where the defendant in a criminal case has been found guilty upon verdict or plea, except for an offense punishable by death or life imprisonment, may, at a time to be determined by the court, hear and determine the question of the probation of such defendant."

It appears, therefore, that the eligibility of a defendant to probation is determined, not by the offense of which the defendant is charged, but by the offense of which he is convicted.

Under the above provision, a defendant is eligible to probation unless the offense of which he is convicted is "an offense punishable by death or life imprisonment." The courts have uniformly held that the phrase "an offense punishable by death or life imprisonment" means that the offender *may* be given or is *liable* to receive the death sentence or a sentence of life imprisonment for the commission of that offense. It is immaterial that a particular offender may actually receive a lighter sentence. (See 35 Words and Phrases, Perm. Ed. 458-459).

Accordingly, if a person be charged with an offense for which the maximum penalty prescribed by law is life imprisonment and be convicted of such offense, he is not eligible to probation even though the court fix a lesser penalty in the particular case. However, if a defendant similarly charged, be convicted of an offense for which the maximum prescribed penalty is less than life imprisonment, he is eligible to probation.

CONVICTS

April 26, 1941.—041-221.

COUNTY PRISONERS—GAIN TIME

QUESTION: (1) Shall gain time for good conduct under Chapter 19199, Acts of 1939, be allowed county prisoners who are confined by reason of the default in payment of fine and costs where the payment is made after part of the time has been served?

(2) What is the procedure necessary for the release of a county prisoner under the gain time act?

*To Hon. Henry M. Farrior, Sheriff, Washington County,
Chipley, Florida:*

(1) When a prisoner confined by reason of his failure to pay fine and costs desires to pay out, he should be given credit upon the amount of fine and costs not only for the time actually served, but also for the constructive time served by reason of good conduct as allowed by Chapter

CORRECTIONAL SYSTEM—Convicts

19199, Laws of Florida. This is the practice followed by the prison department of the Commissioner of Agriculture as to State prisoners.

(2) Chapter 19199 states that the Board of County Commissioners shall grant to county prisoners certain time off for good conduct and there is no discretion involved in such action so that the Clerk of the Board may be directed by a general motion of the Board to issue a release whenever any prisoner is entitled thereto by virtue of such statute. Since the clerk is not required by the statute to keep a record, such as is required of the Commissioner of Agriculture, it would be your duty in the particular case to inform the clerk when the release is necessary.

CONVICTS

October 22, 1941.—041-605.

GUARDS—FIRE ARMS—AUTHORITY TO CARRY

QUESTION: Is a guard of county prisoners permitted to carry fire arms at times other than when on active duty?

To Hon. Nathan Mayo, Commissioner of Agriculture:

The mere fact that a person is a duly appointed guard of County prisoners does not give him authority to carry fire arms when not on active duty; and the carrying or possession of same is a misdemeanor (Section 7202 C.G.L.) unless a license has first been obtained from the County Commissioners as provided by Section 7203 C.G.L.

The letter attached to your request for an opinion refers to the fact that convict guards are required to give bond.

While Section 8550, Compiled General Laws (Chapter 9203, Acts of 1923) require all convict guards to give bond "conditioned upon the performance of their duties and compliance with all rules and regulations duly prescribed for their conduct" such statute refers to and governs county prison guards only at such times as they are on active duty and does not confer any authority or permission to said guards to carry fire arms when they are not on active duty.

CONVICTS

August 1, 1942.—042-375.

GUARDS—PROSECUTION FOR MISTREATMENT OF CONVICT

QUESTION: Should a guard be prosecuted under Section 952.05 or 952.14 of the Florida Statutes, 1941, for beating, kicking, striking or otherwise mistreating a convict?

To Hon. L. Grady Burton, State Attorney, Wauchula, Florida:

Section 952.05, Florida Statutes 1941, provides:

"952.05. Corporal punishment prohibited; penalty.—It is unlawful for any corporal punishment, any cruel or inhuman punishment or any punishment by which the flesh of the body is broken, bruised or lacerated to be inflicted upon any convict at any time or place or upon any prisoner at any time or place.

"Any person who violates the provisions of this section shall be discharged immediately and shall not again be employed in any capacity in connection with the prison system of this state and shall be punished as provided by law for whatever offense he may have committed in per-

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petrating the act. No prisoner shall be punished because of any report or representation which he may have made to any inspector."

Your letter would indicate that you are of the opinion that this statute is applicable only where a guard inflicts cruel and inhuman punishment upon a convict who has violated some rule or regulation to which he is subject. I do not so read this law, but construe the section to mean simply that whenever a guard subjects a convict to cruel or inhuman punishment, regardless of whether the convict has broken some rule or regulation, *that* guard shall be punished as provided by law for whatever offense he may have committed in perpetrating the act. For instance, if the inhuman punishment on the guard's part amounted to an assault with the intent to commit murder, then the guard should be prosecuted for such offense. If, however, the cruel punishment consisted of beating or kicking the convict, or any other similar type of cruel treatment, then the guard should be punished for violating Section 952.14.

It is by Section 952.14 provided:

"Cruel treatment of convicts; permitting convict to escape.—Any agent, prison officer, or guard, having supervision over state convicts, being worked under the provisions of law who shall be guilty of any cruel or inhuman treatment to any convict by neglect or *otherwise*, or shall willfully or negligently permit any convict to escape, shall be punished by imprisonment in the state prison for not exceeding five years, or by fine of not exceeding five thousand dollars."

This last Section was enacted as Section 16, Chapter 6530, Acts of 1913, and, therefore, prescribed one of the offenses referred to in Section 952.05, which was enacted as Section 8, Chapter 9126, Acts of 1923.

It is my opinion that the provisions of Section 952.14 may be construed to furnish the basis for the prosecution of a guard for any beating, kicking, striking, or other cruel or inhuman treatment inflicted by the guard upon the convict.

I hope that this gives you the analysis and consideration which you had in mind. If there is any way that my office can help you in your investigation and a follow-up program, please do not hesitate to call on me therefor.

CONVICTS

May 27, 1942.—042-268.

RELEASE FEES—PAYMENT BY COUNTY

QUESTION: Is the Board of Commissioners of Washington County required and authorized to pay release fees to county convicts under Section 8549, Compiled General Laws, 1927, when in fact the county does not employ such convicts on its public roads since such county convicts are employed on the roads by the State Road Department under Chapter 20156, Acts of 1941, and only re-delivered to the sheriff of the county two days prior to the expiration of their respective terms of sentence?

To Hon. Howard S. Bailey, County Attorney, Chipley, Florida:

Chapter 20516, Acts of 1941, relieves Washington County from the obligation of working and maintaining the public roads of that county, and places the responsibility therefor on the State Road Department

CORRECTIONAL SYSTEM—Convicts

and requires the Road Department to use not to exceed twenty-five of the Washington County convicts on said road work and deliver said convicts back to the sheriff of the county two days prior to the date on which they are entitled to be released.

The last paragraph of Section 8549, Compiled General Laws, 1927, provides as follows:

"When a prisoner is discharged by reasons of having served his sentence, or upon receiving a pardon or parole, he shall be furnished transportation, or its equivalent in money, back to the place from which he was sentenced, together with the sum of five dollars, where the sentence is for four months or more, and the sum of three dollars where the sentence is for a less period than four months, in addition to his transportation, all of which shall be paid out of the general fund of the county in which he was convicted, and for the purpose of carrying out the provisions of this law, the clerk of the board of county commissioners of each county shall under the direction of said board, issue a check on said fund with which to pay these amounts to the convicts being discharged at the time of their release. (Chapter 2090, Acts of 1887, §1, Chapter 5705, Acts 1907; Chapter 5963, Acts 1909, §1, Chapter 7323, May 26, 1917, §1, Chapter 9203, Acts 1923, §1.)"

Based upon the above quotation, it is my opinion that the county is authorized and required to make these payments at the time said convicts are released.

CONVICTS

April 21, 1942.—042-192.

STATE—LEASING FOR COUNTY ROAD WORK

QUESTION: May the Board of Commissioners of State Institutions legally authorize the leasing of state convicts to Hamilton County, Florida, for road work in said county?

To Board of Commissioners of State Institutions:

The various counties are authorized by statute to exchange convicts for road work in such counties provided such exchange is pursuant to contract between such counties.

State convicts may be used by various boards for conservation work, and also may be used by the State Road Department for road building and maintenance.

I can find no authority, however, for the leasing of State convicts to the various counties for road work. The statutes require that State convicts shall be constantly employed for the benefit of the State, and that all convicts not assigned to the State Road Department shall be worked only under direct control of captains and guards selected by the Commissioner of Agriculture and approved by the Board of Commissioners of State Institutions.

It is, therefore, my opinion that the Board has no legal authority to authorize the leasing of State convicts to any of the various counties for road work therein. Of course, the State Road Department may use members of the convict road force under supervision of the State Road Department for maintenance of State roads in the various counties.

CORRECTIONAL SYSTEM—Convicts**CONVICTS**

June 1, 1942.—042-274.

STATE PRISONERS—DISCHARGE FEES

QUESTION: Should transportation be furnished prisoners under the custody of the Superintendent of the Florida Farm Colony upon their discharge or parole, and, if so, should the payment cover transportation to the county from which the prisoner was sent?

*To Hon. J. Maren Dell, Superintendent, Florida Farm Colony:
Gainesville, Florida:*

I am assuming that the prisoners you refer to, and who are under your custody, are State prisoners assigned to you from the State Penitentiary at Raiford, and this opinion is based upon that assumption.

Section 13 of Chapter 20519, Acts of 1941, applies only to prisoners paroled by the Parole Commission, and then only when such parolee is found to be indigent, in which event his parole will specify the destination to which he is to be given the transportation authorized by Section 13, *supra*.

The foregoing provision applies only to convicts placed on parole, and does not apply to a prisoner who is discharged by reason of having served his sentence. The perquisites to which a State convict is entitled when discharged upon completion of his sentence are set out in Section 8590, Compiled General Laws of Florida, 1927, and are "one good suit of clothes, a hat and one pair of shoes, and . . . five dollars to provide the necessities of life until he can procure work." No provision is made for transportation upon the discharge of a State convict upon completion of his sentence.

CONVICTS

November 25, 1941.—041-661.

STATE PRISONERS—DISCHARGE FEE

QUESTION: Is the State Road Department required under Section 13 of Chapter 20519, Acts of 1941, to pay prisoners released from the State convict road force a discharge fee and provide necessary civilian clothes?

To Hon. H. H. Baskin, Secretary, State Road Department:

Section 8621, Compiled General Laws of Florida, 1927, is as follows:

"8621. (6295) MAINTENANCE OF CONVICTS ON ROAD FORCE.—All prisoners employed on the State convict road force shall be transported, housed, fed, clothed and guarded, from such funds as are or may hereafter be apportioned for the use of the State Road Department."

This section only requires the State Road Department to provide for the transportation, care and maintenance of convicts being worked under its supervision, from its funds.

Chapter 20519, Laws of Florida, Acts of 1941, created the State Parole Commission and provided for the release of convicts on parole.

Section 13 of this Act provides in part as follows:

"If such person is indigent at the time he is placed on parole, which fact may be determined in advance by the Commission, he shall be given

CORRECTIONAL SYSTEM—Convicts

his transportation by the nearest route to the destination noted in the parole. In addition thereto he shall be given a suit of clothes, one pair of shoes, a hat, a suit of underclothing, not to exceed in value, in the aggregate, the sum of Fifteen Dollars (\$15.00), and Ten Dollars (\$10.00) in cash, the cost of which shall be payable by the State of Florida as *other expenses of the administration of the State Prison are paid.*"

The discharge fee and cost of clothing is therefore required to be paid as other expenses of the administration of the State Prison are paid. The manner in which these expenses are to be paid is set forth in Section 8579, Compiled General Laws of Florida, 1927, which is as follows:

"8579. (6242) TO MAKE ESTIMATES FOR MAINTENANCE.—The Commissioner of Agriculture shall submit to the board of commissioners of State institutions, on the first day of each month, an estimate of the amount of money necessary for the maintenance of the prison for the current month, and on its approval by the board aforesaid, the Comptroller shall issue his warrant upon the Treasurer to the superintendent of the State prison for the amount of said estimate, and the Treasurer shall pay the same out of the moneys in the treasury not otherwise appropriated. Each estimate shall be accompanied with an account current, with abstracts and vouchers of all expenditures made, and any balance remaining on hand at the end of the month shall be deducted from the amounts estimated or necessary for this purpose in the following month."

Therefore, the discharge fee and cost of clothing required to be furnished convicts placed on parole, should be paid in the same manner as other expenses of the State Prison are paid, as set forth in Section 8579, C.G.L. supra, and the State Road Department is not required to expend its funds for this purpose.

CHAPTER XXXVI

FEDERAL LAWS

HATCH ACT

July 13, 1942.—042-348.

DUAL MEMBERSHIP—POLITICAL PARTIES AND APPOINTIVE BOARDS

QUESTION: May members of political party executive committees be eligible for membership on rationing boards set up under the Executive Department of the Federal government without violating the Hatch Act?

To Hon. Boyce Williams, Chairman, Florida Industrial Commission:

A member of a political party executive committee in this State is eligible for membership on rationing boards and by such dual membership does not come within the purview of the Hatch Act.

IMMIGRATION

July 1, 1941.—041-358.

ALIENS—LITERACY REQUIREMENTS FOR ENTRANCE

QUESTION: How do aliens get into this country without being able to read or write?

To Major H. E. Couchman, JAGD Regis. and Class. Division, State Headquarters for Selective Service, St. Augustine, Florida:

The Federal Statutes provide that:

"All aliens over sixteen years of age, physically capable of reading, who cannot read the English language, or some other language or dialect,"

should be excluded from admission into the United States. 8 U.S.C.A. Section 136 (c). Certain relatives of admissible aliens are admitted and exempted even from this requirement. Aliens, therefore, are allowed by the Federal Statutes to enter this country without being able to read or write the English language, in answer to the specific question which you referred to me.

INCOME TAX

March 3, 1941.—041-99.

STATE EMPLOYEES—VALUE OF MAINTENANCE— COMPUTATION

QUESTION: In complying with a request of the Internal Revenue office to furnish names of employees of the Florida Industrial School for Boys whose salaries bring them within the bracket of those paying income tax, should the superintendent select such names on the basis of cash salary paid, or cash salary plus maintenance?

FEDERAL LAWS—Income Tax*To Board of Commissioners of State Institutions:*

Section 19.22 (a)-3 of Treasury Regulations 103 (as amended by Treasury Decisions 4695, February 29, 1940), provides:

"If a person receives as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished constitutes income subject to tax. If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees."

According to the interpretations of the United States Treasury Department, as a general rule, the test of "convenience of the employer" is if the living quarters or meals in question are furnished to an employee who is required to accept such quarters and meals in order properly to perform his duties, as, for instance, if an employee is subject to immediate service during twenty-four hours of the day, and hence cannot obtain quarters and meals elsewhere without interfering with his duties. For that reason, being required by the employer to accept the quarters or meals furnished by him, their value need not be included in the employee's gross income.

The question whether the employees of the Florida Industrial School for Boys are required to include the value of maintenance received, in addition to the cash salary, is a question of fact that must be determined by examining each particular case. If it can be said that any such employee is furnished maintenance for the convenience of the school, under the test above referred to, then the value of such maintenance need not be computed and added to his cash salary. Otherwise, the fair market value of the maintenance must be included as income under the Federal Income Tax laws.

MILITARY SERVICE

June 10, 1942.—042-296.

SERVICE CONNECTED DISABILITIES—PRESUMPTION

QUESTION: What length of time must a man serve in the armed forces of the United States before a disability incurred by him is presumed to be service connected?

To Board of Commissioners of State Institutions:

Public Law 359 of the 77th Congress, dated December 19, 1941, and regulations pursuant thereto, provide that disability occurring after six months of service in the armed forces is presumed to be service connected unless it can be shown by medical examination that the disease or infirmity did in fact exist at the time of induction or enlistment.

If the disability is service connected, the disabled person should be cared for by the Federal Government rather than placed in a State Institution at State expense.

During the last war, the presumption period was ninety days, and it would appear that the present members of the fighting forces should be entitled to the same presumption in view of the rather rigid examination given them at the time of their induction or enlistment.

With reference to the particular person referred to in your letter, Woodrow W. Boyd, a resident of Bell, Florida, now at Camp Blanding,

FEDERAL LAWS—Military Service

it appears that he was hospitalized on May 23, 1942, at Camp Blanding, some seven and one-half months after he entered the service. However, your enclosures do not show when the symptoms of the present mental disability first appeared, or were first observed, therefore it is impossible to tell from the file whether there is a presumption that the disability is service connected or not.

May I suggest that this case be referred to Mr. Charles Holtslaw, State Service Officer, Bay Pines, Florida, who is interested in and endeavors to be of assistance in cases of this kind.

MILITARY SERVICE

August 18, 1942.—042-399.

SERVICE CONNECTED DISABILITIES—PRESUMPTION

QUESTION: What length of time must a man serve in the armed forces of the United States before a disability incurred by him is presumed to be service connected?

To Dr. J. H. Therrell, Superintendent, Florida State Hospital:

"Public Law 359 of the 77th Congress, dated December 19, 1941, and regulations pursuant thereto, provide that disability occurring after six months of service in the armed forces is presumed to be service connected unless it can be shown by medical examination that the disease or infirmity did in fact exist at the time of induction or enlistment."

If, therefore, your attention is called to the disability of a service man after he has served six months in the armed forces of the United States, you are entitled to presume that such disability is service connected, and the burden of proving that the disease or infirmity causing the disability actually existed at the time of the induction or enlistment is upon the Federal government.

With particular reference to Ben L. Gittings, Second Lieutenant, Fort Knox, Kentucky, about whom you have specifically inquired, you are, in my opinion, justified in presuming that his present disability is service connected in view of the fact, so far as may be ascertained from the information at hand, that Lieutenant Gittings entered the armed services the latter part of 1940 or the early part of 1941.

MILITARY SERVICE

March 1, 1941.—041-95.

**SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940—
TAXATION—MORATORIUM**

QUESTION: Are citizens in military service entitled to moratorium on taxes and assessments under the Soldiers' and Sailors' Civil Relief Act of 1940?

To Hon. J. M. Lee, Comptroller:

"The Soldiers' and Sailors' Civil Relief Act of 1940" with reference to taxes and assessments provides:

"If a person owns and occupies at the commencement of his military service real property for dwelling, agricultural, or business purposes which property is still occupied by his dependents or employees, and if an affidavit is filed with the collector of taxes showing:

FEDERAL LAWS—Military Service

"(a) That a tax or assessment has been assessed upon such property,

"(b) That such tax or assessment is unpaid, and

"(c) That by reason of such military service the ability to pay such tax or assessment is materially affected,

"Such person is entitled to the following relief: No sale, action, or proceeding to enforce the collection of a tax or assessment may be commenced except with the court's permission upon application by the collector of the tax, and the court may stay such proceeding or sale for not more than 6 months after the termination of the period of military service. The unpaid tax or assessment shall bear interest at 6 per cent per annum but no other interest or penalty shall be incurred (sec. 500).

"In the cases of sale or forfeiture for nonpayment of taxes the person in military service has the right to redeem or commence an action to redeem within 6 months after the military service. This time limitation, however, does not shorten any period for redemption now or hereafter provided by the laws of any State or Territory (sec. 500 (3))."

Of course, it is apparent under the circumstances mentioned in said Act that a citizen of this State who is called into Service is governed thereby.

UNITED STATES DISTRICT COURT

August 4, 1941.—041-424.

COSTS—PAYMENT BY COMPTROLLER •

QUESTION: Is the Comptroller required to pay costs in the amount of \$35.00 in a case of the United States vs. W. A. Williams, Jr., as Clerk of the Circuit Court of Putnam County and the Comptroller of Florida? The United States Marshal has attached to the bill a memorandum from the United States Attorney covering the legal phase of the matter.

To Hon. J. M. Lee, Comptroller:

I have examined the same and must say that the authorities he cites lend color to his argument. However, in the past, costs in the United States District Court incurred by a State Officer have usually been paid; this prior to an execution being issued thereon and I see no reason why an exception should be made in this instance.

I, therefore, advise the payment of said costs.

VICTORY TAX

December 31, 1942.—042-581.

STATE FUNDS—PAYROLL DEDUCTIONS

QUESTION: Interpretation as to the legality of use of state funds in making remittances for Victory tax deductions where tax is deducted from amounts paid teachers out of state funds.

To Hon. Colin English, State Superintendent of Public Instruction:

If the Federal government had designated a person or agency other than the employer to collect the tax from the employee, on payment of the salary title to all said funds would have passed to the employee and

FEDERAL LAWS—Victory Tax

on payment of the Victory tax by the employee to the collector no question of state funds would have been involved. The mere fact that the Federal Government has designated the employer, which may happen to be the state or a state agency, as collector of the tax, does not cause said funds to retain their character as state funds at the time the salary is paid and deduction is made. State funds used in such payment and deductions lose their identity as such and become the funds of the salaried employee, five per cent of which is due and owing to the Federal Government.

The employer who, as withholding agent, makes the deduction is merely acting as the collector for the Federal Government to collect the tax from such employee. (Sections 467, 468 U. S. Revenue Act, 1942).

Under Section 469 of said Revenue Act, entitled "Receipts" "every employer required to withhold and collect a tax in respect to the wages of an employee shall furnish to such employee . . . a written statement showing the period covered by the statement, the wages paid by the employer to such employee during such period, and the amount of the tax withheld and collected . . ." and Section 470 of said Act provides penalties for failure to furnish a receipt to the employee.

The cited Federal statute clearly indicates that the tax is being collected from the employee, by deductions made from funds belonging to the employee.

It is my opinion that in collecting the Victory tax from the employee by making deductions at the time of payment of salary, no question is presented which involves state funds.

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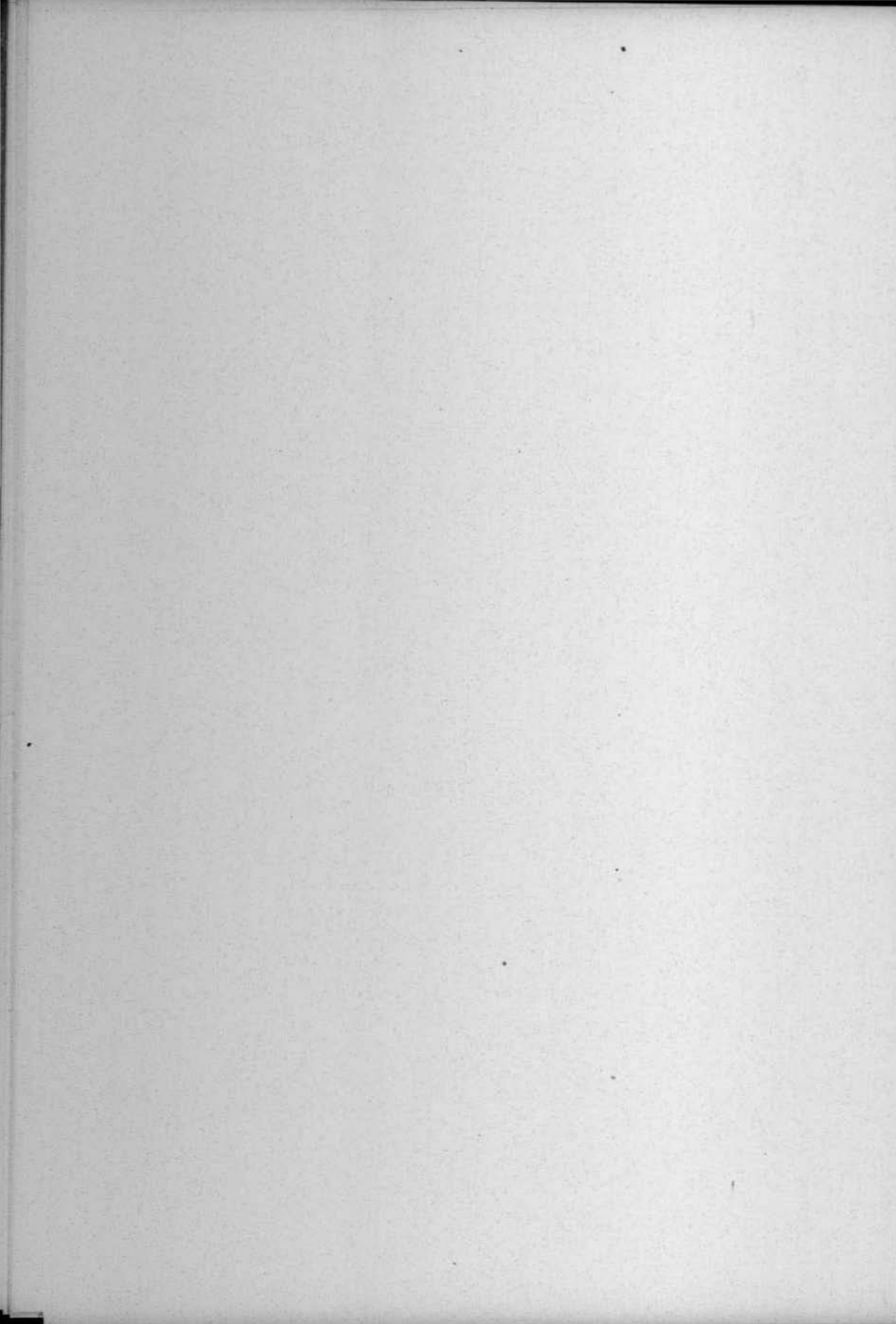
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